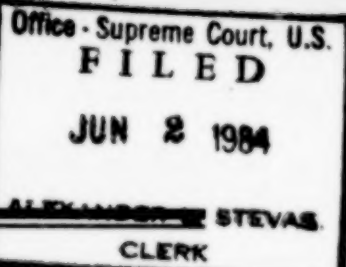


83-1968

No. \_\_\_\_\_



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

RUFUS L. EDMISTEN, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

On Appeal From The United States District Court  
For The Eastern District Of North Carolina

**JURISDICTIONAL STATEMENT**

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**QUESTIONS PRESENTED**

- I. Whether Section 2 of the Voting Rights Act guarantees protected minorities the right to safe electoral districts wherever there occurs a sufficient concentration of minority citizens to create at least one safe black district which ensures black electoral success.
- II. Whether preclearance of a redistricting plan under Section 5 of the Voting Rights Act precludes relitigation of the issue of discriminatory result of that plan by private plaintiffs under Section 2.
- III. Whether racial bloc voting exists as a matter of law whenever less than 50% of the white voters cast ballots for the black candidate.
- IV. Whether the court erred in rejecting substantial evidence that many black leaders were satisfied that electoral access and opportunity for blacks and whites were equal and furthermore, opposed the concept of single member districts advocated by the plaintiffs.

### PARTIES TO THE PROCEEDING BELOW

The Appellants, defendants in the action below, are as follows: Rufus Edmisten, Attorney General of North Carolina; James C. Green, Lieutenant Governor of North Carolina; Liston B. Ramsey, Speaker of the House; The State Board of Elections of North Carolina; R. Kenneth Babb, John L. Stickley, Ruth Semashko, Sydney F.C. Barnwell, and Shirley Herring, members of the State Board of Elections; and Thad Eure, Secretary of State.

The Appellees, plaintiffs in the action below, are as follows: Ralph Gingles, Sippio Burton, Fred Belfield, and Joseph Moody, on behalf of themselves and all others similarly situated.

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**JURISDICTIONAL STATEMENT**  
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**OPINIONS BELOW**

The opinion of the United States District Court for the Eastern District of North Carolina in this case was rendered on January 27, 1984. A copy of the Court's Opinion and Order is set out in Appendix A.

**JURISDICTION**

The case below was a class action by black voters of North Carolina challenging certain multi-member districts in the post-1980 redistricting of the North Carolina General Assembly. The appellants filed their Notice of Appeal in the District Court on February 3, 1984, a copy of which is contained in Appendix B. This appeal is docketed in this Court within the time allowed by order of the Chief Justice, dated March 28, 1984. A copy of this order

is set forth in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

#### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fifteenth Amendment, and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c are set out in Appendix D.

#### STATEMENT OF THE CASE

In July of 1981, the North Carolina General Assembly enacted a legislative redistricting plan in order to conform the State Senate and House of Representative districts to the 1980 census. In keeping with a 300 year old practice in the State, the plans consisted of a combination of single member and multimember districts and each district was composed of either a single county or two or more counties so that no county was divided between legislative districts. The Plaintiffs below filed this action on September 16, 1981 in the United States District Court for the Eastern District of North Carolina alleging among other things, that the multi-member districts diluted black voting strength.

In October 1981, in a special session, the General Assembly repealed and reworked the House plan to reduce the population deviations. Because forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act, the revised House plan and the Senate plan were submitted to the Attorney General for review. The Attorney General interposed objections to both proposals. He found that the state policy against dividing counties resulted in the creation of multi-member districts which in turn tended to submerge black voters in the covered counties.

During the early months of 1982 counsel for the General Assembly worked closely with the Civil Rights Division of the Department of Justice in order to remedy those aspects of the plans found objectionable under Section 5. In February, the General Assembly enacted new redistricting plans in which some county lines were broken in order to overcome the objection in the covered counties of the State. When these plans were submitted, the Attorney General found one problematic district in each plan. These subsequently were redrawn to Justice Department specifications. On April 30, 1982, the Senate and House plans received Section 5 preclearance.

The action below remained pending during the course of these legislative proceedings, and several amendments to the complaint were permitted to accommodate the successive revisions of the redistricting plans. The last supplemental complaint included Section 2 of the Voting Rights Act, as amended on June 29, 1982, as a basis of the plaintiffs' claim of vote dilution. In its final form, the complaint alleged that in 5 General Assembly districts, the use of multi-member configurations diluted the voting strength of black citizens in violation of Amended Section 2. In addition, the plaintiffs alleged vote dilution in another instance where a concentration of black voters was split between 2 Senate districts. The plaintiff class was certified and trial to a three-judge court was held for 8 days commencing July 25, 1983.

The plaintiffs attempted to prove that multi-member House districts in Durham, Forsyth, Mecklenburg and Wake counties, and the multi-member Senate district that included Mecklenburg County, none of which were covered by Section 5, violated Section 2. They also attacked 2 district configurations in the covered area of the State: House district 8 and Senate district 2.



The record reflects the following stipulated facts: Durham County was a 3-member House district which had a black voting age population of 33.6%. Durham has had one black representative to the House continuously since 1973. Two of its five county commissioners are black as are two of its four elected district court judges. The Durham County Board of Elections had a black member from 1970 to 1981. The chairmanship of the Durham County Democratic Party was held by a black from 1969 through 1979 and is currently held by a black for the 1983-85 term.

The black voting age population of Mecklenburg is 24%. Currently one of the eight House members from Mecklenburg County is black. James D. Richardson, who is also black and was running in his first election for public office in 1982, came in ninth in a race for eight seats, with only 250 votes less than the eighth successful candidate. This was in a field of 18 candidates. While there is currently no black senator from the Mecklenburg-Cabarrus County Senate District, James Polk, a first time candidate for public office, ran fifth in a race for four seats in the 1982 election. The Mecklenburg-Cabarrus County Senate District did have a black senator for three terms from 1975 through 1980, until his death before the 1980 elections. In addition, one of the five Mecklenburg County Commissioners, two of the nine Charlotte-Mecklenburg Board of Education members, and one of the ten Mecklenburg County District Court judges, all of whom are black, were elected at-large. In addition, another black was appointed to a vacant district court judgeship in Mecklenburg County, but has not yet had to run for election. One of the three Mecklenburg County Board of Elections members, the current chair, and the immediate past chair of the Mecklenburg County Democratic Executive Committee, are also black.

The City of Charlotte, located in Mecklenburg County, has a population which is 31% black. Harvey Gantt, who is black, currently serves as Mayor of that city. Charlotte also has two black city council members elected from majority black districts.

The five-member House District 39, including most of Forsyth County has a 22% black voting age population and currently has two black representatives as a result of the 1982 elections. Forsyth County has previously elected a black representative for the 1974-76 and 1977-78 General Assemblies. Blacks have also been appointed by the Governor on two occasions to represent Forsyth County in the North Carolina House. This occurred in 1977 when a black representative resigned and again in 1979 when a white representative resigned. One of the five Forsyth County Commissioners and one of the eight Forsyth County School Board members are black. Both Boards are elected at-large. In addition, one of the three members of the Forsyth County Board of Elections is black.

The City of Winston-Salem, located in Forsyth County, has a black population of slightly more than 40% and a black voter registration of slightly less than 32%. The Winston-Salem City Council has eight members elected from wards. Currently, there are three black members elected from majority black wards and one black member elected from a ward with slightly less than 39% black voter registration. The black member defeated a white Democratic incumbent in the primary and a white Republican in the general election.

The current Wake County six member House delegation includes one black member, Dan Blue, who is serving his second term. In the last election, Blue received the highest vote total of the 15 Democrats running in the

primary and the second highest vote total of the 17 candidates running for the six seats in the general election. Although no single-member black Senate district can be constructed in Wake County, Wake elected a black Senator for the 1975-76 and 1977-78 terms.

One of the seven Wake County Commissioners is black. Two of the eight Wake County District Court Judges are black. The Sheriff of Wake County, John Baker, is black and is currently serving his second term. In the 1982 election for his second term, Baker received 63.5% of the votes in the general election over a white opponent. In the Democratic Primary, Baker received over 61% of the vote in defeating two white opponents. Wake County Commissioners District Court Judges, and the Sheriff are all elected at large. According to 1980 figures, 20.5% of the Wake County voting age population are black. Wake County has also had a black member continuously on its three-member Board of Elections since 1977, and the current chair is black.

Despite these stipulated facts, the court below found that the multimember districts in Durham, Forsyth, Mecklenburg and Wake Counties violated Section 2. The court was able to reach this conclusion because it never addressed the ultimate issue of fact posited by the statute—whether black citizens of these districts had equal access to the political process and equal opportunity to elect candidates of their choice. Rather, the court ignored the statutory language and construed the legislative history.

The Report of the Senate Committee on the Judiciary lists nine factors which the Committee suggested might be indicative of vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 28. These factors were culled from the analytical frameworks in *White v. Register*, 412 U.S. 755

(1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1974). The Senate Report makes clear that these factors are merely illustrative of the kinds of evidence a court could consider. No matter how many of these factors a plaintiff proves he must still establish that the challenged electoral mechanism, in the totality of circumstances, results in a denial of electoral access. Because the court below mechanistically applied the factor analysis of the Senate Report without ever relating the evidence to political access in the particular circumstances in this case, the court reached the untenable conclusion that Section 2 was violated even though, "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina." App. at 37a.

#### THE QUESTIONS PRESENTED ARE SUBSTANTIAL

##### I. Section 2 Of The Voting Rights Act Guarantees Access To The Political Process Not Electoral Success Wherever There Occurs A Sufficient Concentration Of Black Citizens To Create At Least One Safe Black District.

On June 29, 1982 Congress enacted amendments to the Voting Rights Act of 1965. Foremost among the changes adopted was a complete transformation of Section 2. Prior to this 1982 amendment, Section 2 had been viewed as simply the statutory restatement of the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55 (1981). Consistent with this Court's rulings, in such cases as *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977), it was necessary to prove both disparate impact and discriminatory intent in order to establish a violation of the Fifteenth Amendment and consequently, of Section 2. This was holding of the plurality of the Court in *City of Mobile*, *supra*.



Section 2(a) as amended provides that no voting law shall be imposed or applied in a manner which results in a denial or abridgement of the right to vote on account of color. Subsection (b) in its entirety reads:

- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973.

By the new language, Congress sought to relieve plaintiffs of the burden of proving discriminatory intent. Under the new Section 2, a plaintiff must show that the challenged election law or practice "results" in unequal access to the political process.

The legislative history of the 1982 amendments to the Voting Rights Act is in many ways internally inconsistent and self-contradictory, in part, because no conference committee report was produced, and the manner in which divergent views of the House and Senate Committee members were compromised was not recorded. One theme, however, is echoed by both Committees and in fact by nearly everyone who commented during the floor debates: Congress intended to codify the standard established by the Supreme Court in *White v. Register*, 412

U.S. 755, (1973). See S.Rep. No. 97-417 (97th Cong. 2d. Sess.) at 32-24; H.Rep. No. 97227 (97th Cong. 1st Sess.) 1981 at 30. In regard to the language ultimately adopted, the Senate Report states that "the substitute amendment codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and the extensive case law which developed around it, into the application of Section 2." S.Rep. at 32.

The district court erred in failing to apply Section 2 in a manner consistent with the judicial precedents expressly identified by Congress. Although the court acknowledged Congress' reliance on *White v. Register*, and some of its progeny, it did not seriously attempt to integrate the language of Section 2 with the case law which Congress sought to codify. Much of the language of subsection (b) of the statute came directly from this Court's opinion in *White*. 412 U.S. at 766.<sup>1</sup> Obviously, it is only in light of the *White v. Register* and the cases which followed that Section 2 can be properly construed. Because the district court attempted to interpret the amended provision without this essential judicial background, it reached several erroneous conclusions of law.

First, the district court erred by equating a violation of Section 2 with the absence of guaranteed proportional representation. The court flatly stated that the essence of a vote dilution claim is this:

[A] racial minority with distinctive group interests that are capable of aid or amelioration by govern-

<sup>1</sup> "The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766.

ment is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior. (citation omitted). App. at 14a.

This statement epitomizes the district court's reading of the amended statute. Although blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats that *numbers alone would presumptively give them*, (i.e. in proportion to their presence in the population) the court found that Section 2 had been violated. All of the vote dilution cases prior to *City of Mobile* run counter to this interpretation. In *David v. Garrison*, for example, the Fifth Circuit wrote that "dilution occurs when the minority voters have no real opportunity to participate in the political process." 553 F.2d 923, 927 (5th Cir. 1977). And in *Dove v. Moore*, the Eighth Circuit in discussing vote dilution under the pre-*Mobile* constitutional standard now codified in Section 2, stated that the "constitutional touchstone is whether the system is open to full minority participation not whether proportional representation is in fact, achieved." 539 F.2d 1152, 1154 (8th Cir. 1976).

The court further misinterpreted the new statute by blurring the clear distinction between effective representation and representation by a member of one's own race. Nothing in the record supports a conclusion that the black residents of the districts at issue have been denied representation in the halls of the General Assembly. The district court, however, based its decision, in part, on the premise that Section 2 guarantees black citizens the right to elect black legislators, at least whenever a sufficient number of blacks is concentrated so as to allow the construction of a safe black single member district around them.

Numerous pre-*City of Mobile* dilution cases strongly refute such a presumption. In *Hendrix v. Joseph* the Fifth Circuit explained that the *Zimmer* factors are designed "to test whether an at-large system has made elected officials so secure in their positions and has made the black vote so unnecessary to success at the polls" that black participation in government is ignored and governmental services to the black community are withheld. 559 F.2d 1265, 1269 (5th Cir. 1977). See also, *David v. Garrison*, 553 F.2d 923, 927. Since the amendment of Section 2, a federal district court in Texas made this pronouncement: "There is simply no right—statutory or constitutional—to be represented by a member of a particular race." *Seamon v. Upham*, No. P-81-49 C.A. (E.D. Tex. Jan. 30, 1984).

The court below struck down the multi-member districts at issue because there was no *guarantee* that blacks would always be elected to the General Assembly from those districts. The court not only presumed that protected minorities have a right to elect members of their own race, it also assumed that the right must be guaranteed by safe black voting-majority districts in which black candidates would always be successful as long as black residents vote as a bloc. This was clearly not the intent of Congress.<sup>2</sup> Other lower federal courts, however, have also adopted erroneous constructions of Section 2 because they have relied on isolated segments of the legislative history and ignored the judicial wisdom which informed

<sup>2</sup> Senator Dole, one of the sponsors of the compromise bill explained that, "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." S. Rep. at 193. See also, *Smith v. Winter*, 717 F.2d 191 (5th Cir. 1983) at 192.



the statutory language. See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. Mar. 2 1984). It is incumbent upon this Court to properly interpret this important legislation.

**II. Preclearance Of A Redistricting Plan Under Section 5 Precludes Readjudication Of The Issue Of Discriminatory Result Of That Plan By Private Plaintiffs Under Section 2.**

Two of the districts challenged by the plaintiffs and found to violate Section 2 consisted of counties covered by Section 5 of the Voting Rights Act: House District 8, a 4-member seat comprised of Nash, Wilson and Edgecombe counties and Senate District 2 which included Northampton, Hertford, Gates, Bertie, Chowan and segments of 4 other counties. The plaintiffs claimed that the multimember configuration in District 8 diluted the black voting potential in that district. As to Senate District 2, the plaintiffs contended that a black concentration sufficient to create a safe black district was split between District 2 (55.1% black) and District 6 (46% black).

Pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, North Carolina must submit any change in its voting laws or practice prior to implementation, to federal authorities. The scope of federal review, however, is limited to those 40 counties which are specifically covered by application of the formula in Section 4(a) of the Act. Accordingly, the State of North Carolina submitted to the Attorney General Chapters 1 and 2 of the Session Laws of the Second Extra Session (the final amended House and Senate redistricting plans).

Under Section 5, the covered State or subdivision has the burden of proving, either by a submission to the Attorney General or by an action for declaratory judg-

ment, that the proposed enactment does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. The revised Section 2 places the burden on the plaintiff to prove that the challenged law has a discriminatory result. Insofar as Section 5 requires the *State* to meet the burden of proving the absence of both discriminatory purpose and effect, Section 5 necessarily presents a more stringent test for the covered jurisdiction than Section 2.

The legislative history of the recent amendment of Section 2 bears this out. In its Report, the House Committee on the Judiciary expressed its concern that the then-current version of Section 2 required proof of discriminatory purpose while a violation of Section 5 required only discriminatory effect. H. Rep. No. 97-227 (97th Cong. 1st Sess.) at 28. In the Committee's view, Section 2 had to be revised so as to apply essentially the same "effects" standard to non-covered jurisdictions. The lawfulness of a voting law should not depend, the Committee stated, on whether the jurisdiction which implements it, is covered or non-covered.

Similarly, in the Senate Report, the point was also made that Section 5 preclearance would preclude a subsequent finding of violation under Section 2. Rep. No. 97-417 at 35. The Committee had set out to refute the findings of the Subcommittee that identified many cities including Savannah, Georgia, as vulnerable under the new standard. The Senate Judiciary Committee, determined that this finding of the Subcommittee was obviously inaccurate. Savannah had completed an annexation in 1978 which had required preclearance. "After subjecting the proposed annexation to the rigorous requirements of Section 5," the Department of Justice decided that the election system provided black voters with adequate

opportunity for participation and election. S. Rep. No. 97-417 at 35. The Senate Report concluded that insofar as Savannah's city council system had passed muster under Section 5, it would necessarily also meet the requirements of the proposed amendment. *Id.* at 35.

It was apparently the intent of Congress that Section 2 make applicable nationwide the "effects" test contained in Section 5. While uncovered jurisdictions remain unaffected by the Section 5 preclearance requirement, they would be subject to the same test of discrimination when sued by individuals or the Attorney General. In view of the legislative intent, Section 5 has already accomplished the purpose of Section 2 in the covered counties.

By letter dated April 30, 1982 the Attorney General informed the State of North Carolina that he had determined that the reapportionment plans for the North Carolina General Assembly "did not have the purpose and would not have the effect of denying or abridging the right to vote" in the 40 counties covered by Section 5 of the Voting Rights Act. Thus, the issue of the discriminatory purpose and effect of the reapportionment had been authoritatively and conclusively determined in the covered counties, the plaintiffs claim to the contrary, in the court below, notwithstanding.

Administrative preclearance and a declaratory judgment are equal alternatives under Section 5. *Morris v. Gressette*, 432 U.S. 491, (1977). Insofar as the Attorney General's approval has the same legal force as a judgment rendered by the District of Columbia federal court, the granted preclearance had a collateral estoppel effect in this case. "Under the doctrine of collateral estoppel . . . the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of

the first action." *Parklane Hosiery v. Shore*, 439 U.S. 322, (1979) at 326, n.5. All facts necessary to a finding of discrimination under Section 2 were at issue and necessarily determined by the Section 5 procedure. Thus, the Attorney General's decision as to the 40 counties should have precluded relitigation of the same issue by the plaintiffs.

The court below rejected out of hand the appellants' contention that insofar as the State had proven under Section 5 that the redistricting of the covered counties had neither a discriminatory purpose nor effect, a challenge under Section 2 to any precleared districts was precluded. The court found that the preclearance of Senate District 2 and House District 8 was not even probative of the issues before them.

The district court relied for this conclusion solely on the opinion in *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983). In that case, plaintiffs mounted a Section 2 challenge to a precleared Congressional district in Louisiana. The Louisiana district court reasoned as follows:

Private plaintiffs are free to mount a *de novo* attack upon a reapportionment plan notwithstanding preclearance. *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n. 9 (5th Cir. 1977). See *Morris v. Gressette*, 432 U.S. 491, 506-07 (1977) ("where the discriminatory character of an enactment is not detected upon review of the Attorney General, it can be challenged in the traditional constitutional [or statutory] litigation.") 574 F.Supp. at 328, n. 1.

Reliance by *Major v. Treen* and the court below on this excerpt from *Morris v. Gressette* is doubly flawed. First of all, the essential language, "or statutory," appears in brackets because the *Major* court simply added it to the actual text of *Morris*. This Court has never held that any



statutory right of action was preserved by Section 5, but rather stated that Section 5 did not preclude a constitutional action in which the plaintiffs had the burden of proving both disparate impact and discriminatory intent. In addition, *Morris v. Gressette* was decided in 1977—long before the amendment of Section 2 and long before a private right of action under the original Section 2 was recognized. The faulty logic of *Major* severely taints the conclusion of the court below regarding the interrelationship of Sections 5 and 2 of the Voting Rights Act.

The sheer absurdity of the district court's ruling that plaintiffs may relitigate issues already disposed of by Section 5 is manifest in the court's discussion of Senate District 2. The court acknowledges that increasing the black percentage in District 2 by adding black residents from the adjacent parts of District 6 would necessarily deplete the influence of those blacks remaining in District 6. Nevertheless, the court ruled that in enacting Section 2, Congress had committed this dilemma "to the judgment of the black community to whom it has given the private right of action under amended Section 2." App. at 52a, n. 33.

The configuration of Districts 2 and 6, however, were precleared by the Attorney General under Section 5. In fact, these districts were designed by counsel and legislative drafters in daily contact with the Assistant Attorney General and members of the staff of the Civil Rights Division. Under Section 5, the Attorney General is specifically charged with representing the black voters of the submitting states. *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982). In the exercise of that obligation the Attorney General determined that it was in the best interests of the black voters not to diminish black in-

fluence in District 6 in order to "pack" District 2. The State followed the suggestions of the Assistant Attorney General in enacting these districts. Now that the State, at great expense and considerable political turmoil, has complied with the wishes of the federal official statutorily charged with representing minority voting interests, it is now ordered by the District court to comply with the wishes of a group of minority voters who apparently disagreed with the Attorney General. This is acutely unfair to the State, especially in light of the fact that the views of the plaintiffs and their counsel were given every consideration by the Civil Rights Division prior to the preclearance.

In light of the large number of Section 2 suits which have been decided or are pending in covered jurisdictions, the preclusive effect of Section 5 on Section 2 litigation must be authoritatively resolved. See, e.g., *Mississippi Republican Executive Committee v. Owen H. Brooks*, No. 83-1722 Jurisdictional Statement filed April 26, 1984.

### III. Racially Polarized Voting Is Not Established As A Matter Of Law Whenever Less Than A Majority Of White Voters Vote For A Black Candidate.

The court accepted the opinion of the plaintiffs' expert that racially polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate.<sup>3</sup> As a result, the court concluded that there

<sup>3</sup> Recently in a denial of a request for rehearing en banc, Judge Higginbotham commented that, "whether polarized voting is present can pivot the legality of at-large voting districts." *Jones v. City of Lubbock*, No. 83-1196 (Fifth Circuit, April 10, 1984). He also expressed serious reservations about the methodology used by experts to analyze polarized voting before the trial court in that case. Judge

was "severe and persistent" racial bloc voting despite the following facts:

a) In the 1982 Mecklenburg House primary, Berry who is black received 50% of the white vote and Richardson who is also black, received 39%. Both black candidates won the primary.

b) In the 1982 House general election for Mecklenburg County, 42% of the white voters voted for Berry; 29% of the whites voted for Richardson. In a field of 18 candidates for 8 seats, 11 white candidates received fewer white votes than Berry. In that election Berry finished second, and Richardson finished ninth, only 250 votes behind the eighth place winner.

c) In the 1982 Senate general election for Durham County, a 3 member seat, Barnes, a black Republican received 17% of the white vote and 5% of the black vote.

d) In the 1982 House general election for Durham County, black candidate Spaulding received 47% of the white vote and won the election.

e) In the 1982 Senate primary election for Mecklenburg County, the black candidate, Polk, received 32% of the white vote and was successful in the primary.

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Higginbotham expressed reservations about the regression model used there to relate the racial makeup of a precinct with the election outcome in that precinct. He noted that the plaintiff's expert "did not test for other explanatory factors than race or ethnicity . . . [such] as campaign expenditure, party identification, media use measured by cost, religion, name identification or distance that a candidate lived from any particular precinct . . . It ignores the reality that race . . . may mask a host of other explanatory variables."

It is interesting to note that the plaintiffs' expert in this case used precisely the same methodology criticized by Judge Higginbotham.

f) In the 1982 Mecklenburg Senate general election, Polk, a black candidate received 33% of the white vote. The leading white candidate received 59% of the white vote.

g) In the 1982 Forsyth House primary, the two black candidates, Hauser and Kennedy, received 25% and 36%, respectively, of the white vote. In a field of 11, Kennedy received more white votes than six of those candidates. Both black candidates won the primary.

h) In the 1982 House general election for Forsyth County, Hauser and Kennedy received 42% and 46% respectively, of the white vote. The successful white candidates received substantially equal support from black and white voters—all within a range between 43% and 63%. Both black candidates were successful.

i) In the 1982 House primary election for Wake County, a six-member district, the only black candidate running, Dan Blue, received more total votes than any other of the 15 candidates. Blue received more white votes than 11 of the other candidates.

j) In the 1982 House general election for Wake County, Blue ran second out of a field of 17 candidates. Blue also received the second highest number of white votes.

k) In the 1982 House primary election for Durham County, one black candidate, Clement, received 32% of the black vote and 26% of the white vote. The black candidate Spaulding received 90% of the black vote and 37% of the white vote. Of the two black candidates, only Spaulding was successful in the primary. Had the black voters wanted to elect Clement, they could have cast double-shot instead of single-shot votes.



1) Finally, of the 11 elected black incumbents who have sought reelection to the General Assembly in recent years, all 11 have won reelection.

In *Rogers v. Lodge*, 458 U.S. 613 (1982), this Court described polarization in terms of its ability to affect election outcomes.

Voting along racial lines allows those elected to ignore black interests without fear of political consequence, and without bloc voting the minority candidates would not lose elections solely because of their race. 458 U.S. at 616.

Racially polarized voting is probative of vote dilution only insofar as it is outcome determinative. In other words, where blacks consistently *lose* elections because no whites or few whites will vote for them, the voting is racially polarized. Where blacks *win* because of bloc voting and single shot voting by blacks, combined with substantial support from whites, then racial polarization does not have any legal significance. See *McMillan v. Escambia County, Florida*, 688 F.2d 960, 966 (5th Cir. 1982); *NAACP v. Gadsden County School Board*, 651 F.2d 978 (11th Cir. 1982).

A candidate is primarily concerned with receiving more votes than his opponents, not with the color of the person who votes for him. Discrete and different voting patterns among racial groups concern the candidate when they operate to prevent him from winning. This political reality lies at the root of Congress' inclusion of polarized voting in Section 2 analysis. The Senate Report explicitly states that "[i]f plaintiffs assert they are denied fair access to the political process in part, *because of* the racial bloc voting context within which the challenged election system works, they would have to prove it." S. Rep. at 34 (emphasis added). The mere presence of different voting

patterns in the white and black electorate does not prove anything one way or the other about the ultimate issue of access to the political process. Insofar as the lower federal courts have viewed racial bloc voting as the "linchpin of vote dilution" (App. A at 43a), it is imperative that this Court formulate a standard by which that condition can be established.

**IV. The District Court Erred In Disregarding Substantial Evidence That Many Black Leaders Were Satisfied That Electoral Access And Opportunity For Blacks And Whites Were Equal And Furthermore Opposed The Concept Of Safe Single-Member Districts Advocated By The Plaintiffs.**

The appellants offered considerable evidence to the three-judge court that showed that many members and leaders of the black community did not support the contentions of the plaintiffs. Several black legislators had opposed the creation of black districts during the legislative drafting and debates. Other state leaders, white and black, testified that black single member districts would destroy the coalitions which had been forged and would resegregate and ghetto-ize the political landscape of the State. Black leaders testified that recent dramatic increases in voter registration among blacks, substantial black influence and leadership in the State Democratic Party, and substantial support for black candidates from the white community exposed the disingenuousness of the plaintiffs' case.

The district court rejected all this evidence as irrelevant to the issues before them based on the following rationale:

Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents

of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition. (footnotes omitted). App. A at 17a-18a.

Nothing in the legislative history supports the court's conclusion that these factors "are not among the circumstances to be considered" in a Section 2 case. App. A at 18a. Certainly Congressional committees received testimony regarding such risks, but neither the Senate Committee Report nor the House Report suggest that such considerations were not germane to an analysis of the totality of circumstances in any particular case. Nor did any of the sponsors of the compromise language ultimately adopted propound this interpretation of Section 2.

This precedent set by the district court must be addressed and corrected. If not, courts will continue, as did the court below, to make findings of fact which are inadequate under Rule 52(a) because they fail to reflect "all the substantial evidence contrary to its opinion." *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. March 2, 1984).

### CONCLUSION

For the reasons stated above the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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## APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

---

No. 81-803-CIV-5

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RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

RUFUS L. EDMISTEN, *et al.*

*Defendants.*

---

FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

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### ORDER

For the reasons set forth in the Memorandum Opinion of the court filed this day;

It is ADJUDGED and ORDERED that:

1. Chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982 (1982 redistricting plan) are declared to violate section 2 of the Voting rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973, by the creation of the following legislative districts: Senate Districts Nos. 2 and 22, and House of Representatives Districts Nos. 8, 21, 23, 36, and 39.

2. Pending further orders of this court, the defendants, their agents and employees, are enjoined from conducting any primary or general elections to elect members of the State Senate or State House of Representatives to represent, *inter*

*alia*, registered black voters resident in any of the areas now included within the legislative districts identified in paragraph 1. of this Order, whether pursuant to the 1982 redistricting plan, or any revised or new plan.

This Order does not purport to enjoin the conduct of any other primary or general elections that the State of North Carolina may see fit to conduct to elect members of the Senate or House of Representatives under the 1982 redistricting plan, or to elect candidates for any other offices than those of the State Senate and House of Representatives. *See* N.C.G.S. 120-2.1 (1983) Cum. Supp.).

3. Jurisdiction of this court is retained to entertain the submission of a revised legislative districting plan by the defendants, or to enter a further remedial decree, in accordance with the Memorandum Opinion filed today in this action.

4. The award of costs and attorneys fees as prayed by plaintiffs is deferred pending entry of a final judgment, or such earlier date as may be shown required in the interests of justice.

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J. Dickson Phillips, Jr.  
United States Circuit Judge

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W. Earl Britt, Jr.  
Chief United States District Judge

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Franklin T. Dupree, Jr.  
Senior United States District Judge

I certify the foregoing to be a true and correct copy of the Order.

J. Rich Leonard, Clerk  
United States District Court  
Eastern District of North Carolina

By Cherlyn Wells  
Deputy Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

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No. 81-803-CIV-5

---

RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

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*Defendants.*

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FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

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MEMORANDUM OPINION

Before PHILLIPS, Circuit Judge, BRITT, Chief District Judge, and DUPREE, Senior District Judge.

PHILLIPS Circuit Judge:

In this action Ralph Gingles and others, individually and as representatives of a class composed of all the black citizens of North Carolina who are registered to vote, challenge on constitutional and statutory grounds the redistricting<sup>1</sup> plan

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<sup>1</sup> For consistency and convenience we use the term "redistricting" throughout as a more technically, as well as descriptively, accurate one than the terms "apportionment" or "reapportionment" sometimes used by the parties herein to refer to the specific legislative action under challenge here. *See Carstens v. Lamm*, 543 F. Supp. 68, 72 n.3 (D. Col. 1982).

enacted in final form in 1982 by the General Assembly of North Carolina for the election of members of the Senate and House of Representatives of that state's bicameral legislature. Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 1343, and 2284 (three judge court) and on 42 U.S.C. § 1973c.

The gravamen of plaintiffs' claim is that the plan makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts, and that in another area of the state the plan fractures into separate voting minorities a comparable concentration of black voters, all in a manner that violates rights of the plaintiffs secured by section 2 of the Voting Rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973 (Section 2, or Section 2 of the Voting Rights Act), 42 U.S.C. §§ 1981 and 1983, and the thirteenth, fourteenth and fifteenth amendments to the United States Constitution.<sup>2</sup> In particular, the claim is that the General Assembly's plan impermissibly dilutes the voting strength of the state's registered black voters by submerging black voting minorities in multi-member House District No. 36 (8 members - Mecklenburg County), multi-member House District No. 39 (5 members - part of Forsyth County), multi-member House District No. 23 (3 members - Durham County), multi-member House District No. 21 (6 members - Wake County), multi-member House District No. 8 (4 members - Wilson, Edgecombe and Nash Counties), and multi-member Senate District No. 22 (4 members - Mecklenburg and Cabarrus Counties), and by fracturing between more than one senate district in the northeastern section of the state a concentration of black voters sufficient in numbers and con-

<sup>2</sup> The original complaint also included challenges to population deviations in the redistricting plan allegedly violative of one-person-one-vote principles, and to congressional redistricting plans being contemporaneously enacted by the state's General Assembly. Both of these challenges were dropped by amended or supplemental pleadings responsive to the evolving course of legislative action, leaving only the state legislature "vote dilution" claims for resolution.

tiguity to constitute a voting majority in at least one single-member district, with the consequence, as intended, that in none of the senate districts into which the concentration is fractured (most notably, Senate District 2 with the largest mass of the concentration) is there an effective voting majority of black citizens.

We conclude on the basis of our factual findings that the redistricting plan violates Section 2 of the Voting Rights Act in all the respects challenged, and that plaintiffs are therefore entitled to appropriate relief, including an order enjoining defendants from conducting elections under the extant plan. Because we uphold plaintiffs' claim for relief under Section 2 of the Voting Rights Act, we do not address their other statutory and constitutional claims seeking the same relief.

## I

### General Background and Procedural History

In July of 1981, responding to its legal obligation to make any redistrictings compelled by the 1980 decennial census, the North Carolina General Assembly enacted a legislative redistricting plan for the state's House of Representatives and Senate. This original 1981 plan used a combination of multi-member and single-member districts across the state, with multi-member districts predominating; had no district in which blacks constituted a registered voter majority and only one with a black population majority; and had a range of maximum population deviations from the equal protection ideal of more than 20%. Each of the districts was composed of one or more whole counties, a result then mandated by state constitutional provisions adopted in 1968 by amendments that prohibited the division of counties in legislative districting. At the time this original redistricting plan was enacted (and at all critical times in this litigation) forty of North Carolina's one hundred counties were covered by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Section 5, or Section 5 of the Voting Rights Act.).



Plaintiffs filed this action on September 16, 1981, challenging that original redistricting plan for, *inter alia*, its population deviations, its submergence of black voter concentrations in some of the multi-member districts, and the failure of the state to obtain preclearance, pursuant to Section 5, of the 1968 constitutional amendments prohibiting county division in legislative districting.

After this action had been filed, the state submitted the 1968 no-division-of-counties constitutional provisions for original Section 5 preclearance by the Attorney General of the United States. While action on that submission was pending, the General Assembly convened again in special session and in October 1981 repealed the original districting plan for the state House of Representatives and enacted another. This new plan reduced the range of maximum population deviations to approximately 16%, retained a preponderance of multi-member districts across the state, and again divided no counties. No revision of the extant Senate districting plan was made.

In November 1981, the Attorney General interposed formal objection, under Section 5, to the no-division-of-counties constitutional provisions so far as they affected covered counties. Objection was based on the Attorney General's expressed view that the use of whole counties in legislative districting required the use of large multi-member districts and that this "necessarily submerges cognizable minority population concentrations into larger white electorates." Following this objection to the constitutional provisions, the Attorney General further objected, on December 7, 1981, and January 20, 1982, to the then extant redistricting plans for both the Senate and House as they affected covered counties.

In February 1982, the General Assembly again convened in extra session and on February 11, 1982, enacted for both the Senate and House revised redistricting plans which divided some counties both in areas covered and areas not covered by Section 5. Again, on April 19, 1982, the Attorney General interposed objections to the revised districting plans for both

the Senate and House. The letter interposing objection acknowledged some improvement of black voters' situation by reason of county division in Section 5 covered areas, but found the improvements insufficient to permit preclearance. The General Assembly once more reconvened in a second extra session on April 26, 1982, and on April 27, 1982, enacted a further revised plan which again divided counties both in areas covered and areas not covered by Section 5. That plan, embodied in chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982, received Section 5 preclearance on April 30, 1982. As precleared under Section 5, the plan constitutes the extant legislative districting law of the state, and is the subject of plaintiffs' ultimate challenge by amended and supplemented complaint in this action.<sup>3</sup>

During the course of the legislative proceedings above summarized, this action proceeded through its pre-trial stages.<sup>4</sup> Amended and supplemental pleadings accommodating to successive revisions of the originally challenged redistricting plan were allowed. Extensive discovery and motion practice was had; extensive stipulations of fact were made and embodied in pretrial orders. The presently composed three-

<sup>3</sup> The final plan's division of counties in areas of the state not covered by Section 5 was challenged by voters in one such county on the basis that the division violated the state's 1968 constitutional prohibition. The claim was that in non-covered counties of the state the constitutional prohibition remained in force, notwithstanding its suspension in covered counties by virtue of the Attorney General's objection. In *Cavanagh v. B.*, No. 82-545-CIV-5 (E.D.N.C. Sept. 22, 1983), which at one time was consolidated with the instant action, this court rejected that challenge, holding that as a matter of state law the constitutional provisions were not severable, so that their effective partial suspension under federal law resulted in their complete suspension throughout the state.

<sup>4</sup> At one stage in these proceedings another action challenging the redistricting plan for impermissible dilution of the voting strength of black voters was consolidated with the instant action. In *Pugh v. Hunt*, No. 81-1066-CIV-5, also decided this day, we earlier entered an order of the deconsolidation and permitted the black plaintiffs in that action to intervene as individual and representative plaintiffs in the instant action.

judge court was designated by Chief Judge Harrison L. Winter of the United States Court of Appeals for the Fourth Circuit on October 16, 1981. The action was designated a plaintiff class action by stipulation of the parties on April 2, 1982. Following enactment and Section 5 preclearance of the April 27, 1982, Senate and House districting plans, the pleadings were closed, with issue joined for trial on plaintiffs' challenge, by amended and supplemented complaint, to that finally adopted plan.

Following a final pre-trial conference on July 14, 1983, trial to the three-judge court was held from July 25, 1983, through August 3, 1983. Extensive oral and documentary evidence was received. Decision was deferred pending the submission by both parties of proposed findings of fact and conclusions of law, briefing and oral argument. Concluding oral arguments of counsel were heard by the court on October 14, 1983, and a limited submission of supplemental documentary evidence by both parties was permitted on December 5, 1983.

Having considered the evidence, the memoranda of law submitted by the parties, the stipulations of fact, and the oral arguments of counsel, the court, pursuant to Fed.R.Civ.P. 52(a), enters the following findings of fact and conclusions of law, prefaced with a discussion of amended Section 2 of the Voting Rights Act and of certain special problems concerning the proper interpretation and application of that section to the evidence in this case.

## II

### Amended Section 2 Of The Voting Rights Act

From the outset of this action plaintiffs have based their claim of racial vote dilution not only on the fourteenth and fifteenth amendments, but on Section 2 of the Voting Rights Act. As interpreted by the Supreme Court at the time this action was commenced, former Section 2,<sup>5</sup> secured no further

<sup>5</sup> Former Section 2, enacted pursuant to Congress's constitutional enforcement powers, provided simply:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political (footnote continued on next page)

voting rights than were directly secured by those constitutional provisions. To the extent "vote dilution" claims lay under either of the constitutional provisions or Section 2,<sup>6</sup> the requirements for proving such a claim were the same: there must have been proven both a discriminatorily "dilutive" effect traceable in some measure to a challenged electoral mechanism and, behind that effect, a specific intent on the part of responsible state officials that the mechanism should have had the effect. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

While this action was pending for trial and after the ultimately challenged redistricting plan had been enacted and given Section 5 preclearance, Congress amended Section 2<sup>7</sup> in drastic and, for this litigation, critically important respects. In rough summary, the amended version liberalized the statutory vote dilution claim in two fundamental ways. It removed any necessity that discriminatory intent be proven, leaving only the necessity to show dilutive effect traceable to a challenged electoral mechanism; and it made explicit that the dilutive effect might be found in the "totality of the circumstances" within which the challenged mechanism operated and not alone in direct operation of the mechanism.

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subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1976).

<sup>6</sup> It is not now perfectly clear—but neither is it of direct consequence here—whether a majority of the Supreme Court considers that a racial vote dilution claim, as well as a direct vote denial claim, lies under the fifteenth amendment and, in consequence, lay under former Section 2. See *Rogers v. Lodge*, 458 U.S. 613, 619 n.16 (1982). It is well settled, however, that such claims lie under the fourteenth amendment, though only upon proof of intent as well as effect. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>7</sup> H.R. 3112, amending Section 2 and extending the Voting Rights Act of 1965, was passed by the House on October 15, 1981. On June 18, 1982, the Senate adopted a different version, S. 992, reported out of its Committee on the Judiciary. The House unanimously adopted the Senate bill on June 23, 1982, and it was signed into law by the President on June 29, 1982. There was no intervening conference committee action.



Following Section 2's amendment, plaintiffs amended their complaint in this action to invoke directly the much more favorable provisions of the amended statute. All further proceedings in the case have been conducted on our perception that the vote dilution claim would succeed or fail under amended Section 2 as now the obviously most favorable basis of claim.<sup>8</sup>

Because of the amended statute's profound reworking of applicable law and because of the absence of any authoritative Supreme Court decisions interpreting it,<sup>9</sup> we preface our findings and conclusions with a summary discussion of the amended statute and of our understanding of its proper application of the vote dilution claim, we may properly rest decision on the amended statute alone and thereby avoid addressing the still subsisting constitutional claims seeking the same relief. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>8</sup> Of course, the direct claims under the fourteenth (and possibly the fifteenth) amendment remain, and could be established under *Bolden* by proof of a dilutive effect intentionally inflicted. But no authoritative decision has suggested that proof alone of an unrealized discriminatory intent to dilute would suffice. A dilutive effect remains an essential element of constitutional as well as Section 2 claims. See Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. W.L. Rev. 689, 737-38 n.318 (1982). Neither is there any suggestion that the remedy for an unconstitutional intentional dilution should be any more favorable than the remedy of discriminatory intent might nevertheless have limited relevance in establishing a Section 2 "results" claim is another matter.

<sup>9</sup> There have, however, been a few lower federal court decisions interpreting and applying amended Section 2 to state and local electoral plans. All generally support the *Major v. Treen*, Civil Action No. 82-1192 Section C (E.D. La. Sept. 23, 1983) (three-judge court); *Rybicki v. State Board of Elections*, No. 81-C-6030 (N.D. Ill. Jan. 20, 1983) (three-judge court); *Thomasville Branch of NAACP v. Thomas County*, Civil Action No. 75-34-THOM (M.D. Ga. Jan. 26, 1983); *Jones v. City of Lubbock*, Civil Action No. CA-5-76-34 (N.D. Tex. Jan. 20, 1983); *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982) (on grant of preliminary injunction).

Section 2, as amended, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Without attempting here a detailed analysis of the legislative history leading to enactment of amended Section 2, we deduce from that history and from the judicial sources upon which Congress expressly relied in formulating the statute's text the following salient points which have guided our application of the statute of the facts we have found.

*First.* The fundamental purpose of the amendment to Section 2 was to remove intent as a necessary element of racial vote dilution claims brought under the statute.<sup>10</sup>

<sup>10</sup> Senator Dole, sponsor of the compromise Senate version ultimately enacted as Section 2, stated that one of his "key objectives" in offering it was to

make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory "results", in which case proof of discriminatory intent or purpose would be neither required, nor relevant. I was convinced of the inappropriateness of an "intent standard"

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This was accomplished by codifying in the amended statute the racial vote dilution principles applied by the Supreme Court in its pre-*Bolden* decision in *White v. Regester*, 412 U.S. 755 (1973). That decision, as assumed by the Congress,<sup>11</sup> required no more to establish the illegality of a state's electoral mechanism than proof that its "result," irrespective of intent, when assessed in "the totality of circumstances" was "to cancel out or minimize the voting strength of racial groups," *Id.* at 765 - in that case by submerging racial minority voter concentrations in state multi-member legislative districts. The *White v. Regester* racial vote dilution principles, as assumed by the Congress, were made explicit in new subsection (b) of Section 2 in the provision that such a "result," hence a violation of secured voting rights, could be established by proof "based on the totality of circumstances . . . that the political processes leading to nomination or election . . . are not equally open to participation" by members of protected minorities. *Cf. id.* at 766.

*Second.* In determining whether, "based on the totality of circumstances," a state's electoral mechanism does so "result" in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in *White v. Regester* and sub-

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as the sole means of establishing a voting rights claim, as were the majority of my colleagues on the Committee.

S. Rep. No. 417, 97th Cong., 2d Sess. 193 (1982) (additional views of Sen. Dole) (hereinafter S. Rep. No. 97-417).

<sup>11</sup> Congressional opponents of amended Section 2 contended in debate that *White v. Regester* did not actually apply a "results only" test, but that, properly interpreted, it required, and by implication found, intent also proven. The right or wrong of that debate is essentially beside the point for our purposes. We seek only Congressional intent, which clearly was to adopt a "results only" standard by codifying a decision unmistakably assumed—whether or not erroneously—to have embodied that standard. See Hartman, *Racial Vote Dilution*, *supra* note 8, at 725-26 & n.236.

sequently elaborated by the former Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). These typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.



While these enumerated factors will often be the more relevant ones, in some cases other factors will be indicative of the alleged dilution.

S. Rep. No. 97-417, *supra* note 10, at 28-29 (footnotes omitted).

*Third.* Congress also intended that amended Section 2 should be interpreted and applied in conformity with the general body of pre-*Bolden* racial vote dilution jurisprudence that applied the *White v. Regester* test for the existence of a dilutive "result."<sup>12</sup>

Critical in that body of jurisprudence are the following principles that we consider embodied in the statute.

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively, *see United Jewish Organization v. Carey*, 430 U.S. 144, 166 n.24 (1977), give it in a voting constituency not racially polarized in its voting behavior. *See Nevett v. Sides*, 571 F.2d 209, 223 & n.16 (5th Cir. 1978). Vote dilution in this sense can exist notwithstanding the relative absence of structural barriers to exercise of the electoral franchise. It can be enhanced by other factors - cultural, political, social, -economic - in which the racial minority is relatively disadvantaged and which further operate to diminish practical political effectiveness. *Zimmer v. McKeithen*, *supra*. But the demonstrable unwillingness of substantial numbers of the ra-

<sup>12</sup> See S. Rep. No. 97-417, *supra* note 10, at 32 ("[T]he legislative intent [is] to incorporate [*White v. Regester*] and extensive case law . . . which developed around it."). See also *id.* at 19-23 (*Bolden* characterized as "a marked departure from [the] prior law" of vote dilution as applied in *White v. Regester*, *Zimmer v. McKeithen*, and a number of other cited federal decisions following *White v. Regester*).

cial majority to vote for any minority race candidate or any candidate identified with minority race interests is the linchpin of vote dilution by districting. *Nevett v. Sides*, *supra*; see also *Rogers v. Lodge*, 458 U.S. 613, 623 (1981) (emphasizing centrality of bloc voting as evidence of purposeful discrimination).

The mere fact that blacks constitute a voting or population minority in a multi-member district does not alone establish that vote dilution has resulted from the districting plan. *See Zimmer*, 485 F.2d at 1304 ("axiomatic" that at-large and multi-member districts are not *per se* unconstitutional). Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population. *Id.* at 1305.<sup>13</sup>

On the other hand, proof that blacks constitute a population majority in an electoral district does not *per se* establish that no vote dilution results from the districting plan, at least where the blacks are a registered voter minority. *Id.* at 1303. Nor does proof that in a challenged district blacks have recently been elected to office. *Id.* at 1307.

Vote dilution in the *White v. Regester* sense may result from the fracturing into several single-member districts as well as from the submergence in one multi-member district of black voter concentrations sufficient, if not "fractured" or "submerged," to constitute an effective single-member district voting majority. *See Nevett v. Sides*, 571 F.2d 209, 219 (5th Cir. 1978).

*Fourth.* Amended Section 2 embodies a congressional purpose to remove all vestiges of minority race vote dilution perpetuated on or after the amendment's effective date by state or local electoral mechanisms.<sup>14</sup> To accomplish this, Con-

<sup>13</sup> This we consider to be the limit of the intended meaning of the disclaimer in amended Section 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

<sup>14</sup> Both the Senate and House Committee Reports assert a purpose to forestall further purposeful discrimination that might evade remedy under (footnote continued on next page)

gress has exercised its enforcement powers under section 5 of the fourteenth and section 2 of the fifteenth amendments<sup>15</sup> to create a new judicial remedy by private action that is broader in scope than were existing private rights of action for constitutional violations of minority race voting rights. Specifically, this remedy is designed to provide a means for bringing states and local governments into compliance with constitutional guarantees of equal voting rights for racial minorities without the necessity to prove an intentional violation of those rights.<sup>16</sup>

*Fifth.* In enacting amended Section 2, Congress made a deliberate political judgment that the time had come to apply

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the stringent intent-plus-effects test of *Bolden* and to eradicate existing or new mechanisms that perpetuate the effects of past discrimination. See S. Rep. 97-417, *supra* note 10, at 40; H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981) (hereinafter H.R. Rep. No. 97-227).

We accept—and it is not challenged in this action by the state defendants—that Congress intended the amendment to apply to litigation pending upon its effective date. See *Major v. Treen*, *supra*, slip op. at 40-41 n.20.

<sup>15</sup> Both the Senate and House Committee Reports express an intention that amended Section 2 be regarded as remedial rather than merely redefinitional of existing constitutional voting rights. See S. Rep. No. 97-417, *supra* note 10, at 39-43; H.R. Rep. No. 97-227, *supra* note 14, at 31.

<sup>16</sup> Congressional proponents of amended Section 2 were at pains in debate and committee reports to disclaim any intention or power by Congress to overrule the Supreme Court's constitutional interpretation in *Bolden* only that the relevant constitutional provisions prohibited intentional racial vote dilution, and to assert instead a power comparable to that exercised in the enactment of Section 5 of the Voting Rights Act to provide a judicial remedy for enforcement of the state's affirmative obligations to come into compliance. See, e.g., S. Rep. 97-417, *supra* note 10, at 41 ("Congress cannot alter the judicial interpretations in *Bolden* . . . [T]he proposal is a proper statutory exercise of Congress' enforcement power. . . .").

No challenge is made in this action to the constitutionality of Section 2 as a valid exercise of Congress's enforcement powers under the fourteenth (and possibly fifteenth) amendment, and we assume constitutionality on that basis. See *Major v. Treen*, *supra*, slip op. 44-61 (upholding constitutionality against direct attack).

the statute's remedial measures to *present conditions* of racial vote dilution that might be established in particular litigation; that national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes, or by voluntary action of state and local governments, or by judicial remedies limited to proof of intentional racial discrimination. See, e.g., S. Rep. 97-417, *supra* note 10, at 193 (additional view of Senator Dole) (asserting purpose to eradicate "racial discrimination which . . . still exists in the American electoral process").

In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority;<sup>17</sup> the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior;<sup>18</sup> the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building;<sup>19</sup> and the

<sup>17</sup> See *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 542-46 (Feb. 1, 1982) (hereafter *Senate Hearings*) (prepared statement of Professor McManus, pointing to disagreements within black community leadership over relative virtues of local districting plans).

<sup>18</sup> See *Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess., *Voting Rights Act*, Report on S. 1992, at 42-43 (Comm. Print 1982) (hereafter *Subcommittee Report*), reprinted in S. Rep. No. 97-417, *supra* note 10, 107, 149 (asserting "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials"); *Subcommittee Report*, *supra*, at 45, reprinted in S. Rep. No. 97-417, *supra* note 10, at 150 (asserting that amended Section 2 would aggravate segregated housing patterns by encouraging blacks to remain in safe black legislative districts).

<sup>19</sup> See *Subcommittee Report*, *supra* note 18, at 43-44, reprinted in S. Rep. No. 97-417, *supra* note 10, at 149-50.



fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.<sup>20</sup>

For courts applying Section 2, the significance of Congress's general rejection or assumption of these risks as a matter of political judgment is that they are not among the circumstances to be considered in determining whether a challenged electoral mechanism presently "results" in racial vote dilution, either as a new or perpetuated condition. If it does, the remedy follows, all risks to these values having been assessed and accepted by Congress. It is therefore irrelevant for courts applying amended Section 2 to speculate or to attempt to make findings as to whether a presently existing condition of racial vote dilution is likely in due course to be removed by normal political processes, or by affirmative acts of the affected government, or that some elements of the racial minority prefer to rely upon those processes rather than having the judicial remedy invoked.

### III

#### Findings of Fact

##### A.

#### The Challenged Districts

The redistricting plans for the North Carolina Senate and House of Representatives enacted by the General Assembly of North Carolina in April of 1982 included six multi-member districts and one single-member district that are the subjects of the racial vote dilution challenge in this action.

<sup>20</sup> See *Senate Hearings*, *supra*, note 17, at 1351-54 (Feb. 12, 1982) (prepared statement of Professor Blumstein); *id.* at 509-10 (Jan. 28, 1982) (prepared statement of Professor Erler), reprinted in S. Rep. No. 97-417, *supra* note 10, at 147; *id.* at 231 (Jan. 27, 1982) (testimony of Professor Berns), reprinted in S. Rep. No. 97-417, *supra* note 10, at 147.

The multi-member districts, each of which continued pre-existing districts and apportionments, are as follows, with their compositions, and their apportionments of members and the percentage of their total populations and of their registered voters that are black:

District	% of Population that is Black	% of Registered Voters that is Black (as of 10/4/82)
Senate No. 22 (Mecklenburg and Cabarrus Counties (4 members)	24.3	16.8
House No. 36 (Mecklenburg County) (8 members)	26.5	18.0
House No. 39 (Part of For- syth County) (5 members)	25.1	20.8
House No. 23 (Durham County) (3 members)	36.3	28.6
House No. 21 (Wake County) (6 members)	21.8	15.1
House No. 8 (Wilson, Nash and Edgecombe Counties) (4 members)	39.5	29.5

As these districts are constituted, black citizens make up distinct population and registered-voter minorities in each.

Of these districts, only House District No. 8 is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration. For example, concentrations of black citizens em-



braced within the following single-member districts, as depicted on exhibits before the court, would meet those criteria:

<i>Multi-Member District</i>	<i>Single-Member District: location and racial composition</i>	<i>Exhibit</i>
Senate No. 22 (Mecklenburg/Cabarrus Counties)	Part of Mecklenburg County; 70.0% Black	Pl. Ex. 9
House No. 36 (Mecklenburg County)	(1) Part of Mecklenburg County; 66.1% Black	Pl. Ex. 4
	(2) Part of Mecklenburg County; 71.2% Black	Pl. Ex. 4
House No. 39 (Part of Forsyth County)	Part of Forsyth County; 70.0% Black	Pl. Ex. 5
House No. 23 (Durham County)	Part of Durham County; 70.9% Black	Pl. Ex. 6 substitute
House No. 21 (Wake County)	Part of Wake County; 67.0% Black	Pl. Ex. 7
House No. 8 (Wilson, Edgecombe, Nash Counties)	Parts of Wilson, Edgecombe and Nash Counties; 62.7% Black	Pl. Ex. 8

The single-member district is Senate District No. 2 in the rural northeastern section of the state. It was formed by extensive realignment of existing districts to encompass an area which formerly supplied components of two multi-member Senate districts (No. 1 of 2 members; No. 6 of 2 members). It consists of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax and Edgecombe Counties. Black citizens made up 55.1% of the total population of the district, and 46.2% of the population that is registered to vote. This does not constitute them an effective voting majority in this district.<sup>21</sup>

<sup>21</sup> We need not attempt at this point to define the exact population level at which blacks would constitute an effective (non-diluted) voting majority, either generally or in this area. Defendant's expert witness testified that a general "rule of thumb" for insuring an effective voting majority is 65%. This  
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This district is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of creation of this single-member district, there was a concentration of black citizens within the boundaries of this district and those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district, which single-member district would satisfy all constitutional requirements of population and geographical configuration. For example, a concentration of black voters embraced within a district depicted on Plaintiff's Exhibit 10(a) could minimally meet these criteria, though a still larger concentration might prove necessary to make the majority a truly effective one, depending upon experience in the new district alignments. In such a district, black citizens would constitute 60.7% of the total population and 51.02% of the registered voters (as contrasted with percentages of 55.1% and 46.2%, respectively, in challenged Senate District 2).

## B

### Circumstances Relevant To The Claim Of Racial Vote Dilution: The "Zimmer Factors"

At the time the challenged districting plan was enacted in 1982, the following circumstances affected the plan's effect

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is the percentage used as a "benchmark" by the Justice Department in administering § 5. Plaintiffs' expert witness opined that a 60% population majority in the area of this district could only be considered a "competitive" one rather than a "safe" one.

On the uncontradicted evidence adduced we find—and need only find for present purposes—that the extant 55.1% black population majority does not constitute an effective voting majority, i.e., does not establish *per se* the absence of racial vote dilution, in this district. See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150 (5th Cir. 1977) ("Where . . . cohesive black voting strength is fragmented among districts, . . . the presence of districts with bare population majorities not only does not necessarily preclude dilution but . . . may actually enhance the possibility of continued minority political impotence.").

upon the voting strength of black voters of the state (the plaintiff class), and particularly those in the areas of the challenged districts.

#### **A History Of Official Discrimination Against Black Citizens In Voting Matters**

Following the emancipation of blacks from slavery and the period of post-war Reconstruction, the State of North Carolina had officially and effectively discriminated against black citizens in matters touching their exercise of the voting franchise for a period of around seventy years, roughly two generations, from ca. 1900 to ca. 1970. The history of black citizens' attempts since the Reconstruction era to participate effectively in the political process and the white majority's resistance to those efforts is a bitter one, fraught with racial animosities that linger in diminished but still evident form to the present and that remain centered upon the voting strength of black citizens as an identified group.

From 1868 to 1875, black citizens, newly emancipated and given the legal right to vote, effectively exercised the franchise, in coalition with white Republicans, to control the state legislature. In 1875, the Democratic Party, overwhelmingly white in composition, regained control of state government and began deliberate efforts to reduce participation by black citizens in the political processes. These efforts were not immediately and wholly successful and black male citizens continued to vote and to hold elective office for the remainder of the nineteenth century.

This continued participation by black males in the political process was furthered by Fusionists' (Populist and Republican coalition) assumption of control of the state legislature in 1894. For a brief season, this resulted in legislation favorable to black citizens' political participation as well as their economic advancement.

The Fusionists' legislative program favorable to blacks impelled the white-dominated Democratic Party to undertake an

overt white supremacy political campaign to destroy the Fusionist coalition by arousing white fears of Negro rule. This campaign, characterized by blatant racist appeals by pamphlet and cartoon, aided by acts of outright intimidation, succeeded in restoring the Democratic Party to control of the legislature in 1898. The 1898 legislature then adopted constitutional amendments specifically designed to disenfranchise black voters by imposing a poll tax and a literacy test for voting with a grandfather clause for the literacy test whose effect was to limit the disenfranchising effect to blacks. The amendments were adopted by the voters of the state, following a comparable white supremacy campaign, in 1900. The 1900 official literacy test continued to be freely applied for 60 years in a variety of forms that effectively disenfranchised most blacks. In 1961, the North Carolina Supreme Court declared unconstitutional the practice of requiring a registrant to write the North Carolina Constitution from dictation, but upheld the practice of requiring a registrant "of uncertain ability" to read and copy in writing the state Constitution. *Bazemore v. Bertie County Board of Elections*, 254 N.C. 398 (1961). At least until around 1970, the practice of requiring black citizens to read and write the Constitution in order to vote was continued in some areas of the state. Not until around 1970 did the State Board of Elections officially direct cessation of the administration of any form of literacy test.

Other official voting mechanisms designed to minimize or cancel the potential voting strength of black citizens were also employed by the state during this period. In 1955, an anti-single shot voting law applicable to specified municipalities and counties was enacted. It was enforced, with the intended effect of fragmenting a black minority's total vote between two or more candidates in a multi-seat election and preventing its concentration on one candidate, until declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). In 1967, a numbered-seat plan for election in multi-member legislative districts was enacted. Its effect was, as intended, to prevent single-shot voting in multi-member legislative dis-



tricts. It was applied until declared unconstitutional in the *Dunston* case, *supra*, in 1972.

In direct consequence of the poll tax and the literacy test, black citizens in much larger percentages of their total numbers than the comparable percentages of white citizens were either directly denied registration or chilled from making the attempt from the time of imposition of these devices until their removal. After their removal as direct barriers to registration, their chilling effect on two or more generations of black citizens has persisted to the present as at least one cause of continued relatively depressed levels of black voter registration. Between 1930 and 1948 the percentage of black citizens who successfully sought to register under the poll tax and literacy tests increased from zero to 15%. During this eighteen-year period that only ended after World War II, no black was elected to public office in the state. In 1960, twelve years later, after the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), only 39.1% of the black voting age population was registered to vote, compared to 92.1% of age-qualified whites. By 1971, following the civil rights movement, 44.4% of age-qualified blacks were registered compared to 60.6% of whites. This general range of statewide disparity continued into 1980, when 51.3% of age-qualified blacks and 70.1% of whites were registered, and into 1982 when 52.7% of age-qualified blacks and 66.7% of whites were registered.<sup>22</sup>

<sup>22</sup> The recent history of white and black voter registration statewide and in the areas of the challenged districts is shown on the following chart.

	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Whole State	61.7	43.7	70.1	51.3	66.7	52.7
Mecklenburg	71.3	40.8	73.8	48.4	73.0	50.8
Forsyth	65.8	58.7	76.3	67.7	69.4	64.1
Durham	63.0	39.4	70.7	45.8	66.0	52.9
Wake	61.2	37.5	76.0	48.9	72.2	49.7
Wilson	60.9	36.3	66.9	40.9	64.2	48.0

(footnote continued on next page)

Under the present Governor's administration an intelligent and determined effort is being made by the State Board of Elections to increase the percentages of both white and black voter registrations, with special emphasis being placed upon increasing the levels of registration in groups, including blacks, in which those levels have traditionally been depressed relative to the total voting age population. This good faith effort by the currently responsible state agency, directly reversing official state policies which persisted for more than seventy years into this century, is demonstrably now producing some of its intended results. If continued on a sustained basis over a sufficient period, the effort might succeed in removing the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens. But at the present time the gap has not been closed, and there is of course no guarantee that the effort will be continued past the end of the present state administration.

The present condition - which we assess - is that, on a statewide basis, black voter registration remains depressed relative to that of the white majority, in part at least because of the long period of official state denial and chilling of black

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	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Edgecombe	63.8	37.9	68.2	50.4	62.7	53.1
Nash	61.2	39.0	72.0	41.2	64.2	43.0
Bertie	75.6	46.0	77.0	54.1	74.6	60.0
Chowan	71.3	44.3	77.4	53.9	74.1	54.0
Gates	80.9	73.5	83.9	77.8	83.6	82.3
Halifax	66.8	40.9	72.0	50.4	67.3	55.3
Hertford	75.6	56.6	81.8	62.5	68.7	58.3
Martin	69.3	49.7	76.9	55.3	71.2	53.3
Northampton	72.4	58.8	77.0	63.9	82.1	73.9
Washington	74.3	62.8	82.2	68.0	75.6	67.4



citizens' registration efforts. This statewide depression of black voter registration levels is generally replicated in the areas of the challenged districts, and in each is traceable in part at least to the historical statewide pattern of official discrimination here found to have existed.

#### **Effects Of Racial Discrimination In Facilities, Education, Employment, Housing And Health**

In consequence of a long history, only recently alleviated to some degree, of racial discrimination in public and private facility uses, education, employment, housing and health care, black registered voters of the state remain hindered, relative to the white majority, in their ability to participate effectively in the political process.

At the start of this century, *de jure* segregation of the races in practically all areas of their common life existed in North Carolina. This condition continued essentially unbroken for another sixty-odd years, through both World Wars and the Korean conflict, and through the 1950's. During this period, in addition to prohibiting inter-racial marriages, state statutes provided for segregation of the races in fraternal orders and societies; the seating and waiting rooms of railroads and other common carriers; cemeteries; prisons, jails and juvenile detention centers; institutions for the blind, deaf and mentally ill; public and some private toilets; schools and school districts; orphanages; colleges; and library reading rooms. With the exception of those laws relating to schools and colleges, most of these statutes were not repealed until after passage of the federal Civil Rights Act of 1964, some as late as 1973.

Public schools in North Carolina were officially segregated by race until 1954 when *Brown v. Board of Education* was decided. During the long period of *de jure* segregation, the black schools were consistently less well funded and were qualitatively inferior. Following the *Brown* decision, the public schools remained substantially segregated for yet another fifteen years on a *de facto* basis, in part at least because of various practical impediments erected by the state to judicial

enforcement of the constitutional right to desegregated public education recognized in *Brown*. As late as 1960, only 226 black students throughout the entire state attended formerly all-white public schools. Until the end of the 1960's, practically all the state's public schools remained almost all white or almost all black. Substantial desegregation of the public schools only began to take place around a decade ago, following the Supreme Court's decision in *Swann v. Mecklenburg County Board of Education*, 402 U.S. 1 (1971). In the interval since, "white-flight" patterns in some areas of the state have prevented or reversed developing patterns or desegregation of the schools. In consequence, substantial pockets of *de facto* segregation of the races in public school education have arisen or have continued to exist to this time though without the great disparities in public funding and other support that characterized *de jure* segregation of the schools.

Because significant desegregation of the public schools only commenced in the early 1970's, most of the black citizens of the state who were educated in this state and who are over 30 years of age attended qualitatively inferior racially segregated public schools for all or most of their primary and secondary education. The first group of black citizens who have attended integrated public schools throughout their educational careers are just now reaching voting age. In at least partial consequence of this segregated pattern of public education and the general inferiority of *de jure* segregated black schools, black citizens of the state who are over 25 years of age are substantially more likely than whites to have completed less than 8 years of education (34.6% of blacks; 22.0% of whites), and are substantially less likely than whites to have had any schooling beyond high school (17.3% of blacks; 29.3% of whites).

Residential housing patterns in North Carolina, as generally in states with histories of *de jure* segregation, have traditionally been separated along racial lines. That pattern persists today in North Carolina generally and in the areas covered by the challenged districts specifically; in the latter, virtually all residential neighborhoods are racially identifiable. Statewide,

black households are twice as likely as white households to be renting rather than purchasing their residences and are substantially more likely to be living in overcrowded housing, substandard housing, or housing with inadequate plumbing.

Black citizens of North Carolina have historically suffered disadvantage relative to white citizens in public and private employment. Though federal employment discrimination laws have, since 1964, led to improvement, the effects of past discrimination against blacks in employment continue at present to contribute to their relative disadvantage. On a statewide basis, generally replicated in the challenged districts in this action, Blacks generally hold lower paying jobs than do whites, and consistently suffer higher incidences of unemployment. In public employment by the state, for example, a higher percentage of black employees than of whites is employed at every salary level below \$12,000 per year and a higher percentage of white employees than black is employed at every level above \$12,000.

At least partially because of this continued disparity in employment opportunities, black citizens are three times as likely as whites to have incomes below the poverty level (30% to 10%); the mean income of black citizens is 64.9% that of white citizens; white families are more than twice as likely as black families to have incomes over \$20,000; and 25.1% of all black families, compared to 7.3% of white families, have no private vehicle available for transportation.

In matters of general health, black citizens of North Carolina are, on available primary indicators, as a group less physically healthy than are white citizens as a group. On a statewide basis, the infant mortality rate (the standard health measure used by sociologists) is approximately twice as high for non-whites (predominately blacks) as for whites. This statewide figure is generally replicated in Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe and Nash Counties (all included within the challenged multi-member districts). Again, on a statewide basis, the death rate is higher for black

citizens than for white, and the life-expectancy of black citizens is shorter than is that of whites.

On all the socio-economic factors treated in the above findings, the status of black citizens as a group is lower than is that of white citizens as a group. This is true statewide, and it is true with respect to every county in each of the districts under challenge in this action. This lower socioeconomic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests.<sup>23</sup>

#### **Other Voting Procedures That Lessen The Opportunity Of Black Voters To Elect Candidates Of Their Choice**

In addition to the numbered seat requirement and the anti-single shot provisions of state law that were declared unconstitutional in 1972, *see supra* p. 28, North Carolina has, since 1915, had a majority vote requirement which applies to all primary elections, but not to general elections. N.C.G.S. § 163-111.<sup>24</sup>

The general effect of a majority vote requirement is to make it less likely that the candidates of any identifiable voting

<sup>23</sup> Section 2 claimants are not required to demonstrate by direct evidence a causal nexus between their relatively depressed socio-economic status and a lessening of their opportunity to participate effectively in the political process. *See* S. Rep. No. 97-417, *supra* note 10, at 29 n.114. Under incorporated *White v. Regester* jurisprudence, "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977). Independently of any such general presumption incorporated in amended Section 2, we would readily draw the inference from the evidence in this case.

<sup>24</sup> There is no suggestion that when originally enacted in 1915, its purpose was racially discriminatory. That point is irrelevant in assessing its present effect, as a continued mechanism, in the totality of circumstances bearing upon plaintiffs' dilution claim. *See* Part II, *supra*.



minority will finally win elections, given the necessity that they achieve a majority of votes, if not in a first election, then (if called for) in a run-off election. This generally adverse effect on any cohesive voting minority is, of course, enhanced for racial minority groups if, as we find to be the fact in this case, *see infra* pp. 48-58, racial polarization in voting patterns also exists.

While no black candidate for election to the North Carolina General Assembly—either in the challenged districts or elsewhere—has so far lost (or failed to win) an election solely because of the majority vote requirement, the requirement nevertheless exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts to elect candidates of their choice.

The North Carolina majority vote requirement manifestly operates with the general effect noted upon *all* candidates in primary elections. Since 1950, eighteen candidates for the General Assembly who led first primaries with less than a majority of votes have lost run-off elections, as have twelve candidates for other statewide offices, including a black candidate for Lt. Governor and a black candidate for Congress. The requirement therefore necessarily operates as a general, ongoing impediment to any cohesive voting minority's opportunity to elect candidates of its choice in any contested primary, and particularly to any racial minority in a racially-polarized vote setting.<sup>25</sup>

North Carolina does not have a subdistrict residency requirement for members of the Senate and House elected from multi-member districts, a requirement which could to some degree off-set the disadvantage of any voting minority in multi-member districts.<sup>26</sup>

<sup>25</sup> See *White v. Regester*, 412 U.S. 775, 766 (1973).

<sup>26</sup> See *id.* at 766 n.10.

### Use Of Racial Appeals In Political Campaigns

From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns. The appeals have been overt and blatant at some times, more subtle and furtive at others. They have tended to be most overt and blatant in those periods when blacks were openly asserting political and civil rights—during the Reconstruction-Fusion era and during the era of the major civil rights movement in the 1950's and 1960's. During the period from ca. 1900 to ca. 1948 when black citizens of the state were generally quiescent under *de jure* segregation, and when there were few black voters and no black elected officials, racial appeals in political campaigning were simply not relevant and accordingly were not used. With the early stirrings of what became the civil rights movement following World War II, overt racial appeals reappeared in the campaign of some North Carolina candidates. Though by and large less gross and virulent than were those of the outright white supremacy campaigns of 50 years earlier, these renewed racial appeals picked up on the same obvious themes of that earlier time: black domination or influence over "moderate" or "liberal" white candidates and the threat of "negro rule" or "black power" by blacks "bloc voting" for black candidates or black-"dominated" candidates. In recent years, as the civil rights movement, culminating in the Civil Rights Act of 1964, completed the eradication of *de jure* segregation, and as overt expressions of racist attitudes became less socially acceptable, these appeals have become more subtle in form and furtive in their dissemination, but they persist to this time.

The record in this case is replete with specific examples of this general pattern of racial appeals in political campaigns. In addition to the crude cartoons and pamphlets of the outright white supremacy campaigning of the 1890's which featured white political opponents in the company of black political leaders, later examples include various campaign materials,



unmistakably appealing to the same racial fears and prejudices, that were disseminated during some of the most hotly contested statewide campaigns of the state's recent history: the 1950 campaign for the United States Senate; the 1954 campaign for the United States Senate; the 1960 campaign for Governor; the 1968 campaign for Governor; the 1968 Presidential campaign in North Carolina; the 1972 campaign for the United States Senate; and most recently, in the imminent 1984 campaign for the United States Senate.

Numerous other examples of assertedly more subtle forms of "telegraphed" racial appeals in a great number of local and statewide elections, abound in the record. Laying aside the more attenuated forms of arguably racial allusions in some of these, we find that racial appeals in North Carolina political campaigns have for the past thirty years been widespread and persistent.

The contents of these materials reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices on the part of white citizens in regard to black citizens and to black citizens' participation in the political processes of the state. The continued dissemination of these materials throughout this period and down to the present time evidences an informed perception by the persons who have disseminated them that they have had their intended effect to a degree warranting their continued use.

On this basis, we find that the historic use of racial appeals in political campaigns in North Carolina persists to the present time and that its effect is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

#### **The Extent Of Election Of Black Citizens To Public Office**

*Statewide history.* It appears that, with one exception, no black citizen was elected during this century to public office in North Carolina until after World War II. In 1948 and during

the early 1950's a few black citizens were elected to various city councils. Twenty years later, in 1970, there were in the state 62 black elected officials. In 1969 a black citizen was elected to the State House of Representatives for the first time since Reconstruction; in 1975 two blacks were elected, for the first time, to the Senate. From 1970 to 1975 the number of black elected officials increased from 62 to over 200 statewide; in 1982, that number had increased to 255.

At present the number of elected black officials remains quite low in relation to total black population, which is 22.4% of the state total. Black citizens hold 9% of the city council seats (in cities of over 500 population); 7.3% of county commission seats; 4% of sheriff's offices; and 1% of the offices of Clerk of Superior Court. There are 19 black mayors, 13 of whom are in majority black municipalities. Of the black city council members, approximately 40% are from majority black municipalities or election districts. Three black judges have been elected in statewide elections to seats to which they had been appointed by the Governor. Other than these judges, no black has yet been elected during this century to any statewide office or to the Congress of the United States as a representative of this state.

Between 1971 and 1982 there have been, at any given time, between two and four black members of the North Carolina House of Representatives out of a total of 120—between 1.6% and 3.3%. From 1975 to 1983 there have been, at any given time, either one or two black members of the State Senate out of a total of 50—between 2% and 4%. Most recently, in 1982, after this action was filed, 11 black citizens were elected to the State House of Representatives. Six of those 11 were elected from multi-member districts in which blacks constituted a voting minority (including 5 of those challenged); 5 were elected from newly created majority black districts.

Historically, in those multi-member districts where some blacks have succeeded in being elected, overall black candidacies have been significantly less successful than white candida-

cies have been significantly less successful than white candidates. Black candidates who, between 1970 and 1982, won in Democratic primaries in the six multi-member districts under challenge here were three times as likely to lose in the general election as were their white Democratic counterparts, a fact of statistical significance in assessing the continued effect of race in those elections.

#### **In The Challenged Multi-Member Districts**

##### **House District 36 (Mecklenburg County); Senate District 22 (Mecklenburg/Cabarrus Counties).**

In this century one black citizen has been elected to the State House of Representatives and one black citizen has been elected to the Senate from Mecklenburg County. The House member was elected as one of an eight-member delegation in 1982, after this lawsuit was commenced. Seven other black citizens had previously run unsuccessfully for a House seat. The Senate member served as one of a 4-member delegation from Mecklenburg and Cabarrus Counties from 1975 to 1980. Since then two black citizens have run successfully and no black now serves on the Senate delegation.

Since World War II, blacks, who now constitute 31% of the city's population, have been elected to the City Council of Charlotte, but never in numbers remotely proportional to their percentage of the city's population. During the period 1945 to 1975, when the council was elected all at-large, blacks constituted 5.4% of its membership. From 1977-1981, when the council was elected partially at-large and partially by districts, blacks won 28.6% of the district seats compared with 16.7% of the at-large seats, though more ran for the latter than the former.

One black citizen has been elected (three times) and defeated one time for membership on the five-member County Board of Commissioners, and presently serves. Two black citizens have been elected and now serve on the nine-member County Board of Education.

Following trial of this action, a black citizen was elected mayor of the City of Charlotte, running as a Democrat against a white Republican. The successful black candidate, a widely-respected architect, received approximately 38% of the white vote.

##### **House District No. 29 (part of Forsyth County).**

Before 1974 Black citizens had been elected to the City Council of Winston-Salem, but to no other public office. In 1974 and again in 1976 a black citizen was elected to the House of Representatives as one of a five-member delegation. In 1978 and 1980 other black citizens ran unsuccessfully for the House. In 1982, after this litigation was commenced, two black citizens were elected to the House.

No black citizen has been elected to the Senate from Forsyth County.

Since 1974, a black citizen has been elected, twice failed to be reelected, then succeeded in being reelected to one of eight seats on the otherwise all-white Board of Education; and another has been elected, failed to be reelected, then succeeded in being reelected to one of five seats on the otherwise all-white Board of County Commissioners.

##### **House District No. 23 (Durham County).**

Since 1973 a black citizen has been elected each two-year term to the State House. No black citizen has been elected to the Senate. Since 1969, blacks have been elected to the Board of County Commissioners, and three of twelve Durham City Council members are blacks elected in at-large elections. The City of Durham is 47% black in population.

##### **House District No. 21 (Wake County).**

A black citizen has been twice elected to the State House five-member delegation from this district and is presently serving. Another black citizen was elected for two terms to the State Senate, serving from 1975 to 1978.



A black citizen has been twice elected Sheriff of Wake County and is presently in that office. Another black citizen, who lives in an affluent white neighborhood, has served since 1972 as the only black on the seven-member County Board of Commissioners. Another black citizen, elected from a majority black district, serves as the only black on the nine-member County School Board. Another black citizen served one term as mayor of the City of Raleigh from 1973 to 1975, and still another serves on the Raleigh City Council.

**House District No. 8 (Edgecombe, Nash, Wilson Counties).**

There has never been a black member of the State House or Senate from the area covered by this district. There had never been a black member of the Board of County Commissioners of any of the three counties until 1982 when two blacks were elected to the five-member Board in Edgecombe County, in which blacks constitute 43% of the registered voters. In Wilson County, where the black population is 36.5% of the total, one of nine members of the County Board of Education is black. In the City of Wilson, which is over 40% black in population, one of six city councilmen is black.

**Senate District No. 2 ( Northampton, Hertford, Gates, Bertie, Chowan, and parts of Washington, Martin, Halifax and Edgecombe Counties).**

No black person has ever been elected to the State Senate from any of the area covered by the district. In the last four years, black candidates have won three elections for the State House from areas within the borders of this district, one in 1980 in a majority-white multi-member district, two in 1982 in different majority-black districts. In Gates County, where 49% of the registered voters are black, a black citizen has been elected and presently serves as Clerk of Court. In Halifax County, black citizens have run successfully for the Board of County Commissioners and for the City Council of Roanoke Rapids.

Looking only to these basic historical facts respecting black citizens' election to public office, we draw the following inferences. Thirty-five years after the first successful candidacies for public office by black citizens in this century, it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina. The chances of a black candidate's being elected are better where the candidacy is in a majority-black constituency, where the candidacy is in a single-member rather than a multi-member or at-large district, where it is for local rather than statewide office, and where the black candidate is a member of the political party currently in the ascendancy with voters. Relative to white candidates running for the same office at whatever level, black candidates remain at a disadvantage in terms of relative probability of success. The overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population. There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.<sup>27</sup> In any event, the success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even

<sup>27</sup> Both parties offered evidence—anecdotal, informed "lay opinion," and documentary—to establish on the one hand that recent black successes indicated an established breakthrough from any preexisting racial vote dilution and on the other, that those successes are too "haphazard" and aberrational in terms of specific candidacies, issues, and political trends and, in any event, still too minimal in numbers, to support any such ultimate inference. Heavily emphasized with respect to successful black candidacies in 1982 was the fact that in some elections the pendency of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting, and that this cannot be expected to recur. Our finding, as stated in text, reflects our weighing of these conflicting inferences.



arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

### Racial Polarization in Voting

Statistical evidence presented by duly qualified expert witnesses for plaintiffs, supplemented to some degree by direct testimony of lay witnesses, establishes, and we find, that within all the challenged districts racially polarized voting exists in a persistent and severe degree.

### Multi-Member Districts

To analyze the existence and extent of any racially polarized voting in the challenged multi-member districts, Dr. Bernard Grofman, a duly qualified expert witness for plaintiffs, had collected and studied data from 53 sets of recent election returns involving black candidacies in all of the challenged multi-member districts.<sup>28</sup> Based upon two complementary methods of analysis of the collected data,<sup>29</sup> Grofman gave as his opinion, and we find, that in each of the elections analyzed racial polarization did exist and that the degree revealed in every

<sup>28</sup> Included were all the elections for the General Assembly in which there were black candidates in Mecklenburg, Durham, and Forsyth County; elections for the State House of Representatives in Wilson, Edgecombe, and Nash Counties; and elections for the State Senate in Cabarrus County for the election years 1978, 1980, and 1982; county-wide local elections in each of Wilson, Edgecombe and Nash Counties in which there were black candidates. The 53 elections included both primary and general elections and represented a total of 32 different election contests.

<sup>29</sup> The two methods employed, both standard in the literature for the analysis of racially polarized voting, were an "extreme case" analysis and an "ecological regression" analysis. The extreme case analysis focuses on voting in racially segregated precincts; the regression analysis uses both racially segregated and racially mixed precincts and provides any corrective method to reflect the fact that voters in the two types may behave differently. In Dr.

(footnote continued on next page)

election analyzed was statistically significant, in the sense that the probability of its occurring by chance was less than one in 100,000;<sup>30</sup> and that in all but two of the elections the degree revealed was so marked as to be substantively significant, in the sense that the results of the individual election would have

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Grofman's analysis the results under both methods conformed closely in most cases. The purpose of both methods is simply to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates.

Defendants' duly qualified expert witness, Dr. Thomas Hofeller, had studied Dr. Grofman's data and the mathematics of his analysis of that data, and heard his live testimony. Aside from two mathematical or typographical errors, Dr. Hofeller did not question the accuracy of the data, its adequacy as a reliable sample for the purpose used, nor that the methods of analysis used were standard in the literature. He questioned the reliability of an extreme case analysis standing alone, but, as indicated, Dr. Grofman's did not stand alone. Dr. Hofeller also questioned Dr. Grofman's failure to make an exact count of voter turn-out by race rather than using estimated figures. The literature makes no such demand of precision in obtaining this figure, and Dr. Grofman's method of estimating is accepted. Dr. Hofeller made no specific suggestion of error in the figures used.

We have accepted the accuracy and reliability of the data collected and the methods of analysis used by Dr. Grofman for the purposes offered. The general reliability of Dr. Grofman's analysis was further confirmed by the testimony of Dr. Theodore Arrington, a duly qualified expert witness for the Pugh intervenor-plaintiffs, see note 4, *supra*. Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization in the narrower area of his study.

<sup>30</sup> These conclusions were reached by determining the correlation between the voters of one race and the number of voters who voted for a candidate of specified race. In experience, correlations above an absolute value of .5 are relatively rare and correlations above .9 extremely rare. All correlations found by Dr. Grofman in the elections studied had absolute values between .7 and .98, with most above .9. This reflected statistical significance at the .00001 level - probability of chance as explanation for the coincidence of voter's and candidate's race less than one in 100,000. Cf. *Major v. Treen*, *supra*, slip op. 30-32 n.17 (comparable analysis of racial vote polarization by correlation coefficients).

been different depending upon whether it had been held among only the white voters or only the black voters in the election.<sup>21</sup>

Additional facts revealed by this data support the ultimate finding that severe (substantively significant) racial polarization existed in the multi-member district elections considered as a whole.<sup>22</sup> In none of the elections, primary or general, did a black candidate receive a majority of white votes cast. On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested. Republican voters were more disposed to vote for

<sup>21</sup> The two exceptions involved 1982 State House elections in Durham and Wake Counties, respectively, in which black candidates were elected to seats in majority white multi-member districts. Both were incumbents, and in Durham County there were only two white candidates in the race for three seats so that the black candidate had to win. Though each black candidate won, neither received a majority of the white vote cast. These two exceptions did not alter Dr. Grofman's conclusion that, in his terms, racial polarization in the elections analyzed as a whole was substantially significant. Nor do they alter our finding to the same effect.

<sup>22</sup> Defendants' expert witness questioned the accuracy of any opinion as to the "substantive" significance of statistically significant racial polarization in voting that did not factor in all of the circumstances that might influence particular votes in a particular election. This flies in the face of the general use, in litigation and in the general social science literature, of correlation analysis as the standard method for determining whether vote dilution in the legal (substantive) sense exists, a use conceded by defendant's expert.

white Democrats than to vote for black Democrats. The racial polarization revealed, of course, runs both ways, but it was much more disadvantageous to black voters than to white. Aside from the basic population and registered voter majority advantages had by white voters in any racially polarized setting, fewer white voters voted for black candidates than did black voters for white candidates. In these elections, a significant segment of the white voters would not vote for any black candidate, but few black voters would not vote for any white candidate. One revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates.

The racial polarization revealed in the multi-member elections considered as a whole exists in each of the challenged districts considered separately, as indicated by the following specific findings related to elections within each district.

**House District No. 36 And Senate District No. 22  
(Mecklenburg And Cabarrus Counties).**

In elections in House District No. 36 (Mecklenburg County) between 1980 and 1982, the following percentages of black and white voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

In elections in Senate District No. 22 (Mecklenburg and Cabarrus Counties) between 1978 and 1982, the following per-



centages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

The fact that candidate Berry received votes from one half of the white voters in the primary does not alter the conclusion that there is substantial racially polarized voting in Mecklenburg County in primaries. There were only seven white candidates for eight positions in the primary and one black candidate had to be elected. Berry, the incumbent chairman of the Board of Education, ranked first among black voters but seventh among whites.

The only other black candidate who approached receiving as many as half of the white votes was Fred Alexander, running in the 1978 Senate primary as an incumbent. Alexander ranked last among white voters in the primary and would have been defeated if the election had been held only among the white voters.

Approximately 50% of the white voters voted for neither Berry nor Alexander in the general election.

#### House District No. 39 (Forsyth County).

In House and Senate elections in Forsyth County from 1978-1982 the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 House -				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 House -				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate -				
Small	12	61	n/a	n/a
1982 House -				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

As revealed by this data, no black candidate, whether successful or not, has received more than 40% of the white votes cast in a primary, and no black candidate has received more than 46% of the white votes cast in a general election during the last four elections.

Though black candidates Kennedy and Hauser won the House election in 1982, this does not alter the conclusion that substantial racial polarization of voting continued through that election. White voters ranked Kennedy and Hauser seventh and eighth, respectively, out of eight candidates in the general election. In contrast black voters ranked them first and second respectively.

#### House District No. 23 (Durham County).

In House and Senate Elections from 1978 through 1982, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 Senate -				
Barns (Repub.)	n/a	n/a	17	5
1978 House -				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
<i>1980 House -</i>				
Spaulding	n/a	n/a	49	90
<i>1982 House -</i>				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

Black candidate Spaulding ran uncontested in the general election in 1978 and in the primary and general election in 1980. In the 1982 election there was no Republican opposition and the general election was, for all practical purposes, unopposed. A majority of white voters failed to vote for the black candidate in the general election in each of these years even when they had no other choice. Furthermore, in the 1982 primary, there were only two white candidates for three seats so that one black necessarily had to win. Even in this situation, 63% of white voters did not vote for the black incumbent, the clear choice of the black voters. At least 37% of white voters voted for no black candidate even when one was certain to be elected.

#### House District No. 21 (Wake County).

In elections for the North Carolina House of Representatives from 1978 through 1982 the following percentages of white and black voters voted for the black candidate indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

The fact that black candidate Blue won election in the last two of these candidacies does not alter the conclusion that substantial racial polarization in voting persists in this district. In Wake County winning the Democratic primary is historically tantamount to election. Nevertheless, in these elections

from 60% to 80% of white voters did not vote for the black candidate in the primary compared to 76% and 80% of black voters who did.

Wake County is overwhelmingly Democratic in registration and normally votes along party lines. Nonetheless, 55% of white voters did not vote for the black Democrat in the general election.

#### House District No. 8 (Wilson, Nash, Edgecombe Counties).

In county-wide or district-wide elections from 1976 through 1982 in House District No. 8 and Wilson, Edgecombe and Nash Counties, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
<i>House District No. 8</i>				
1982 House-Carter	4	66		
<i>Wilson County</i>				
1982 Congress-				
1st Primary-Michaux	6	96		
2nd Primary-Michaux	7	98		
1976 County Commission-				
Jones	32	77		
<i>Edgecombe County</i>				
1982 Congress-				
1st Primary-Michaux	2	84		
2nd Primary-Michaux	3	97		
1982 County Commission-				
Green	0	14		
McClain	0	27		
Thorne	4	75	38	91
Walker	2	82	36	94



	Primary White Black	General White Black
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## Nash County

## 1982 Congress-

1st Primary	6	73
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2nd Primary	6	81
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## 1982 County Commission-

Sumner	9	82
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With one exception, over this period more than 90% of the white voters have failed to vote for the black candidate in every primary in each of these three counties. The one time, in 1982, that black Democratic candidates have run in a general election, they failed to receive over 60% of the white vote even though Edgecombe County is overwhelmingly (88.5%) Democratic.

This data reveals racial polarization of voting in House District No. 8 so extreme that, all other factors aside, no black has any chance of winning election in the district as it is presently constituted. This conclusion, as expressed in evidence by plaintiffs' expert witness, was not seriously challenged by defendants.

## Single-Member District

## Senate District No. 2.

Essentially unchallenged and unrebutted opinion evidence given by plaintiffs' expert witness, Dr. Grofman, and testimonial evidence of experienced local political observers and black community leaders establishes that severe and persistent racial polarization in voting exists in the area covered by the challenged single-member Senate District No. 2.

Based on these evidentiary findings with respect to racial polarization in voting, we find that in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and that in each district it presently operates to minimize the voting strength of black voters.

Other Factors Bearing Upon The Claim  
Of Racial Vote Dilution

*Increased participation by black citizens in the political process.*

The court finds that in recent years there has been a measurable increase in the ability and willingness of black citizens to participate in the state's political processes and in its government at state and local levels. The present state administration has appointed a significant number of black citizens to judicial and executive positions in state government, and evinces a good faith determination further to open the political processes to black citizens by that means. In some areas of the state, including some of those directly involved in this litigation, there is increased willingness on the part of influential white politicians openly to draw black citizens into political coalitions and openly to support their candidacies. Indeed, among the witnesses for the state were respected and influential political figures who themselves fit that description.

The court has considered what this implies for the plaintiffs' claim of present racial vote dilution—of a present lack of equal opportunity by black citizens relative to white citizens to participate in the political process and to elect candidates of their choice. Our conclusion is that though this wholesome development is undoubtedly underway and will presumably continue, it has not proceeded to the point of overcoming still entrenched racial vote polarization, and indeed has apparently done little to diminish the level of that single most powerful factor in causing racial vote dilution. The participatory level of black citizens is still minimal in relation to the overall black population, and, quite understandably, is largely confined to the relatively few forerunners who have achieved professional status or otherwise emerged from the generally depressed socio-economic status which, as we have found on the record produced in this case, remains the present lot of the great bulk of black citizens.

### Divisions Within The Black Community.

Not all black citizens in North Carolina, notwithstanding that the class technically certified in this action includes all who are registered to vote, share the same views about the present reality of racial vote dilution in the challenged districts (or presumably elsewhere), nor about the appropriate solution to any dilution that may exist.

Several black citizens testified in this action, as witnesses for the state, to this effect, identifying their own views as opposed to those advanced by plaintiffs' witnesses. In terms of their experience, achievement and general credibility as witnesses, the views of these defendant-witnesses were clearly as deserving of acceptance by the court as were those of the black citizens who, in larger numbers, testified as witnesses for the plaintiffs.

Two facts appeared, however, to the court. The first is that the views expressed by defendants' witnesses went almost exclusively to the desirability of the remedy sought by plaintiffs, and not to the present existence of a condition of vote dilution. The other fact is that the defendants' witnesses' views must be accounted, on the record adduced in this case, a distinct minority viewpoint within the plaintiff class as certified. The division between the two elements is essentially one of proper political ends and means to break free of racial vote dilution as a present condition, and not of the present existence of that condition. Only if a dissident element were so large as to draw in question the very existence of an identifiable black community whose "ability to participate" and "freedom to elect candidates of *its* choice" could rationally be assessed, could the existence of a dissident view have relevance to the establishment of a racial vote dilution claim. That clearly is not the circumstance here, on the record made in this action. As earlier indicated, the further political question of the proper means to eradicate such racial vote dilution as might be shown presently to exist has been decided by Congress and does not properly figure in our judicial inquiry. See Part II, *supra*.

### Fairness Of The State Legislative Policy Underlying The Challenged Redistricting

Under amended § 2 it presumably remains relevant to consider whether race-neutral and compelling state policies might justify a redistricting plan that concededly, or at least arguably, "results" *prima facie* in racial vote dilution. The Senate Report, discussing the continued relevance of the "tenuous state policy" inquiry as one of the incorporated *Zimmer* factors that evolved in *White v. Regester* dilution jurisprudence, indicates as much, though "tenuousness" as a gauge of intent is obviously no longer relevant under § 2's "result-only" test.

If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, *supra* note 10, at 29 & n.117. See also *Major v. Treen*, *supra*, slip op. 67-74 (analyzing state redistricting policy in terms of fairness).

The parties in this litigation have addressed the point under the "tenuous state policy" rubric, and we will assume the inquiry's continued relevance under a "results"-only test. On this basis, we are persuaded that no state policy, either as demonstrably employed by the legislature in its deliberations, or as now asserted by the state in litigation, could "negate a showing" here that actual vote dilution results from the challenged district plan.

During the legislative deliberations on the redistricting plan, the legislature was well aware of the possibility that its plan could result under then applicable federal law in impermissible dilution of black citizens' voting strength if concentrations of black voters were intentionally "submerged" in multi-member districts or "fractured" into separate districts. That fact was brought to its attention by special counsel, by black citizens' groups concerned with the problem, and by various



legislators who proposed plans specifically designed to avoid any possibility of impermissibly diluting black citizens' votes in these ways. The specific dilution problems presented by the black voter concentrations in the challenged districts in this litigation were known to and discussed in legislative deliberations.

The basic policy justification advanced by the state in this litigation for the legislature's declination to create single-member districts to avoid submerging concentrations of black voters in the challenged multi-member districts was the maintenance of an historical, functionally sound tradition of using whole counties as the irreversible "building blocks" of legislative districting. Although the state adduced fairly persuasive evidence that the "whole-county" policy was well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications, that all became largely irrelevant as matters developed in this particular legislative redistricting plan. At the time of its final enactment, the state policy—though compelled—was that counties *might* be split. When the Attorney General declined to give preclearance to the state constitutional prohibition of county divisions in redistricting, the state acquiesced and, indeed, divided counties thereafter both in non-covered as well as covered counties in the final redistricting plan. See note 3, *supra*. To the extent the policy thereafter was to split counties only when necessary to meet population deviation requirements or to obtain § 5 preclearance of particular districts—and this is what the record demonstrates—such a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution.

The same findings apply, though with added force, to Senate District No. 2. There, of course, in the final plan counties *were* split; indeed four were split in the face of a proposed plan which would have yielded an effective black-majority single-member district which only involved splitting two counties. Other policy considerations that were plainly shown to have influenced the legislature in its final drawing of Senate District No. 2 lines

were the protection of incumbents and, in the words of one legislator-witness in this action, swallowing the "smallest of three pills" offered by the Justice Department in preclearance negotiations respecting the lowest permissible size of the black population concentration in the district. Obviously, neither of these policies could serve to outweigh a racial dilution result.

The final policy consideration suggested by the state is the avoidance of race-conscious gerrymandering. While there may be some final constitutional constraint here, *cf. Karcher v. Daggett*, \_\_\_ U.S. \_\_\_, \_\_\_, 51 U.S.L.W. 4853, 4860 (U.S. June 22, 1983) (Stevens, J., concurring), we find that it is not approached here by the available means of avoiding submergence or fragmentation of any of the black voter concentrations at issue. The most serious problem is that posed by the configuration of the black voter concentration in House District No. 8, comprised of Wilson, Nash and Edgecombe Counties. The configuration of the single-member district specifically suggested by the plaintiffs as a viable one is obviously not a model of aesthetic tidiness. But given the evidence, not challenged by defendants, that in the present multi-member district the black population, 39.5% of the total, simply cannot hope ever to elect a candidate of its choice, aesthetics, as opposed to compactness and commonality of interests, cannot be accorded primacy. See *Carstens v. Lamm*, *supra*; *Skolnick v. State Electoral Board*, 336 F. Supp. 839, 843 (N.D. Ill. 1971) (three-judge court) (even compactness not a fundamental requirement).

#### Ultimate Findings Of Fact

1. Considered in conjunction with the totality of relevant circumstances found by the court—the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting, substantial to severe racial polarization in voting, the effects of thirty years of persistent racial appeals in political campaigns, a relatively depressed socio-economic status resulting in significant degree from a century of *de jure* and *de facto* segregation, and the

continuing effect of a majority vote requirement—the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Considered in conjunction with the same circumstances, the creation of single-member Senate District No. 2 results in the black registered voters in an area covered by Senate Districts Nos. 2 and 6 having their voting strength diluted by fracturing their concentration into two districts in each of which they are a voting minority and in consequence have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>33</sup>

<sup>33</sup> The state challenges the basic premise of this finding with the familiar argument that the relative merits of legislative division of a minority population that is not large enough to form voting majorities in two single-member districts into an effective voting majority in one single-member district and an ineffective minority in another or, on the other hand, dividing it into two substantially influential minorities in two districts is so problematical that neither the one nor the other division can properly be adjudged "dilutive" by a court. See, e.g., *Seamon v. Upham*, 536 F. Supp. 931, 949 (E.D. Tex.) (three-judge court) *rev'd on other grounds*, 456 U.S. 37 (1982); compare *Jordan v. Winter*, 541 F. Supp. 1135, 1143 (N.D. Miss. 1982) (three-judge court), *vacated and remanded for further consideration in light of amended § 2*, 103 S. Ct. 2077 (1983) (legislative preference unchallengeable) with *Kirksey v. Board of Supervisors*, 554 F.2d at 150 (dilution possible even if one of districts has a bare black population majority). The specific argument here is that any increase in the present minority population of 55.1% in Senate District No. 2 will be at the expense of the present 49.3% black population in Senate District No. 6, the obvious source of District 2 increase.

We are not impressed with the argument. While the dilemma is a real one, we think it is one that Congress has, in effect, committed to the judgment of the black community to whom it has given the private right of action under amended § 2. The right created is, by definition, that of a "class" and the procedural means of vindicating it by a class action has also been provided by

(footnote continued on next page)

## IV

## CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter of the action under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1973c.

2. The court is properly convened as a three-judge court under 28 U.S.C. § 2284(a).

3. The action has been properly certified as a class action on behalf of all black residents of North Carolina who are registered to vote. No challenge is made to the propriety of the class action under any of the criteria of the governing class action rule, Rule 23, Fed. R. Civ. P.

4. Of the challenged districts, only House District No. 8 (Wilson, Edgecombe and Nash) and Senate District No. 2 include counties that are covered under § 4(a) of the Voting

(footnote continued from previous page)

Congress in Fed.R.Civ.P. 23. When, as here, such a class action is brought by a class which includes such a fragmented concentration of black voters, a group judgment about the group's best means of access to the political process must be assumed reflected in the specific claim made by the class. The legitimacy of that group judgment, from the standpoint of members of the class identified, can be put to test by standard procedures: by challenges to the adequacy of representation or the typicality of claims by any members of the identified class who question the wisdom or validity of the class claim under Rule 23(a)(3) & (4), Fed.R.Civ.P., or even by attempted intervention under Rule 24, Fed.R.Civ.P. When, as here, no such challenges are made, a dilution claim made by the class is properly assessed in the terms made, and on the understanding that any judgment entered on its basis will be binding on all members of the class who may not later second-guess it under ordinary principles of claim preclusion, see Restatement (Second) Judgments § 24 comments b, c; § 25 comments f, m; § 41(1)(e), (2) comment e, or, possibly, judicial estoppel, see *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982).

If this were not the approach taken, a foolproof means would be provided for irremediable fracturing of any such minority voter concentration. That cannot have been intended by Congress. A different situation of course would be presented if the class of black voters bringing such a dilution-by-fracturing claim included only the voters in one of the districts into which the fracturing had occurred. That is not this case.



Rights Act and for which preclearance is required under § 5 of that Act, 42 U.S.C. § 1973c.

The Attorney General's indication on April 27, 1982, that, so far as it affected covered counties, he would interpose no objection under § 5 to the legislative enactment of the redistricting plan which, *inter alia*, created House District No. 8 and Senate District No. 2 does not have the effect of precluding this claim by plaintiffs brought under amended § 2 to challenge the redistricting plan in respect of these two districts. 42 U.S.C. § 1973c; *Major v. Treen*, *supra*, slip op. at 200 n.1; *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n.9 (5th Cir. 1979); *see also Morris v. Gressette*, 432 U.S. 491, 506-07 (1977). Because the standards by which the Attorney General assesses voting changes under § 5 are different from those by which judicial claims under § 2 are to be assessed by the judiciary, *see* S. Rep. No. 97-417, *supra* note 10, at 68, 138-39, and because the former are applied in a non-adversarial administrative proceeding, the Attorney General's preclearance determination has no issue preclusive (collateral estoppel) effect in this action. *See* Restatement (Second) Judgments §§ 27 comment C; 83(2) & (3) (1980).

5. The meaning and intended application of amended § 2 of the Voting Rights Act in relation to the claims at issue in this action are as stated in Part II of this Memorandum Opinion.

6. On the basis of this court's ultimate findings of fact, the plaintiffs have established that the creation by the General Assembly of North Carolina of multi-member House Districts Nos. 8, 21, 23, 36 and 39, multi-member Senate District No. 22, and single-member Senate District No. 2 will, as applied, result in an abridgement of their voting rights, as members of a class protected by subsection (a) of amended § 2 of the Voting Rights Act, in violation of that section.

7. The plaintiffs are entitled to appropriate relief from the violation.

## V

## REMEDY

Having determined that the state's redistricting plans, in the respects challenged, are not in compliance with the mandate of amended § 2 of the Voting Rights Act, the court will enter an order declaring the redistricting plan violative of § 2 in those respects, and enjoining the defendants from conducting elections pursuant to the plan in its present form.

In deference to the primary jurisdiction of state legislatures over legislative reapportionment, *White v. Weiser*, 412 U.S. 783, 795 (1973), we will defer further action to allow the General Assembly of North Carolina an opportunity to exercise that jurisdiction in an effort to comply with § 2 in the respects required. This is especially appropriate where, as here, the General Assembly adopted the plan found violative of § 2 before the enactment of the amended version of that statute which now applies, and where there has accordingly been no previous legislative opportunity to assess the amended statute's substantial new requirements for affirmatively avoiding racial vote dilution rather than merely avoiding its intentional imposition.

Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class in the ways here found, or in other ways. *See In re: Illinois Congressional Districts Reapportionment Cases*, No. 81 C 1395, slip op. (N.D. Ill. 1981), *aff'd mem. sub nom.*, *Ryan v. Otto*, 454 U.S. 1130 (1982); *Rybicki v. State Board of Elections*, No. 81 C 6030 (N.D. Ill. Jan. 12, 1982); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

Recognizing the difficulties posed for the state by the imminence of 1984 primary elections, the court will convene at any time, upon request of the state, to consider and promptly to rule upon any redistricting plan that has been enacted by the

State in an effort to comply with the mandates of § 2 and with this decision. Failing legislative action having that effect within a reasonable time under the circumstances, not later than March 16, 1984, the court will discharge its obligation to develop and implement an appropriate remedial plan.

An appropriate order will issue.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

\_\_\_\_\_  
No. 81-803-CIV-5  
\_\_\_\_\_

RUFUS EDMISTEN, *et al.*,  
*Plaintiffs,*  
  
v.  
RALPH GINGLES, *et al.*  
*Defendants.*

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rufus L. Edmisten, et al., defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the final order and injunction entered in this action on January 24, 1984.

This appeal is taken pursuant to 28 USC § 1253.

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## APPENDIX C

SUPREME COURT OF THE UNITED STATES

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 No. A-774
 

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RUFUS EDMISTEN, *et al.*,*Appellants,*

v.

RALPH GINGLES, *et al.*


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 ORDER
 

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UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including June 2, 1984.

/s/ Warren E. Burger  
 Chief Justice of the United States  
 WARREN E. BURGER

Dated this 28th  
 day of March, 1984.

## APPENDIX D

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fifteenth Amendment:

**Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**Section 2.** The Congress shall have power to enforce the article by appropriate legislation.

42 U.S.C. 1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973C:

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prere-

quisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, prac-

tice, or procedure, In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.